No. 90-1390-CSX
Status: GRANTED

Title: General Motors Corporation, et al. Petitioners
v.
Evert Romein, et al.

Docketed:
March 5, 1991

Court: Supreme Court of Michigan

Counsel for petitioner: Shapiro,Stephen M.

Counsel for respondent: Bratt,Barrie R., Sachs,Theodore, O'Reilly,James M., Gold,Laurence, Casey,Thomas L.

Entry	Date	Note	Proceedings and Orders
1	Mar 5 1991	G	Petition for writ of certiorari filed.
3	Mar 25 1991		Order extending time to file response to petition until April 19, 1991.
4	Mar 25 1991		The above extension is for all respondents.
5	Apr 17 1991		Brief amicus curiae of National Council of Self-Insurers filed.
7	Apr 17 1991	G	Motion of Michigan Self-Insurers' Association for leave to file a brief as amicus curiae filed.
6	Apr 18 1991		Brief of respondent Evert Romein and Arturo Gonzalez in opposition filed.
8	Apr 19 1991		Brief of respondent Michigan Attorney General in opposition filed.
9	Apr 19 1991		Brief amici curiae of Michigan Association of Insurance Companies, et al. filed.
10	Apr 19 1991		Brief amici curiae of National Association of Manufacturers, et al. filed.
11	Apr 23 1991		Reply brief of petitioners General Motors Corporation, et al. filed.
12	Apr 24 1991		DISTRIBUTED. May 9, 1991
13	May 13 1991		Motion of Michigan Self-Insurers' Association for leave to file a brief as amicus curiae GRANTED.
14	May 13 1991		Petition GRANTED.
			**********
16	Jun 18 1991		Order extending time to file brief of petitioner on the merits until July 12, 1991.
20	Jul 11 1991		Brief amici curiae of Michigan Association of Insurance Companies, et al. filed.
21	Jul 11 1991		Brief amicus curiae of Motor Vehicle Manufacturers Association filed.
17	Jul 12 1991		Joint appendix filed.
18	Jul 12 1991		Brief of petitioners General Motors Corporation, et al. filed.
19	Jul 12 1991		Brief amicus curiae of Washington Legal Foundation filed.
22	Jul 12 1991	D	Motion of the Attorney General of Michigan for divided argument filed.
24	Aug 5 1991		Order extending time to file brief of respondent on the merits until September 5, 1991.
25	Aug 28 1991		Record filed.
		*	Certified record - Supreme Court of Michigan (1 box)
26	Sep 5 1991		Brief of respondent Michigan Attorney General filed.
27	Sep 5 1991		Brief amicus curiae of United States filed.
29	Sep 6 1991		Brief of respondents Evert Romein and Arturo Gonzalez filed.

Entry	Date	Note	Proceedings and Orders
30	Sep 6 1991		Brief amici curiae of Council of State Governments, et al. filed.
28	Sep 13 1991		Motion of the Attorney General of Michigan for divided argument DENIED.
31	Sep 16 1991	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
32	Oct 7 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
33	Oct 9 1991		Reply brief of petitioners General Motors Corporation, et al. filed.
34	Oct 11 1991		CIRCULATED.
35	Oct 15 1991		SET FOR ARGUMENT TUESDAY, DECMEBER 10, 1991. (2ND CASE).
36	Nov 1 1991	X	Reply brief of petitioners General Motors Corporation, et al. filed.
37	Dec 10 1991		ARGUED.

No. 90-1390

Supreme Court, U.S.
FILED
MAR 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, ***Petitioner***

v.

EVERT ROMEIN, ET AL., ***Respondents***

FORD MOTOR COMPANY, ***Petitioner***

v.

ARTURO GONZALEZ, ET AL., ***Respondents***

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

PETITION FOR A WRIT OF CERTIORARI

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

JACK F. WHEATLEY
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

In 1981, the State of Michigan enacted a statute providing that the amount of workers' compensation benefits paid after March 31, 1982, would be reduced by the amount of any other employer-financed income replacement benefits, such as pensions. In 1985, the Michigan Supreme Court ruled that this statute applied to all payments to be made to employees, whether they were injured before 1982 or thereafter. In 1987, however, the Michigan legislature amended the 1981 statute retroactively, eliminated the offset provision as applied to pre-1982 injuries, and required employers to reopen all such claims paid between 1982 and 1987 and to refund, with interest, any amounts that were lawfully withheld pursuant to the 1981 statute.

The questions presented are as follows:

1. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

2. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Frank J. Kelley, the Attorney General of Michigan, intervened in these cases, was an appellee in the Supreme Court of Michigan, and is a respondent in this Court. Ford Motor Company's non-wholly owned subsidiaries are listed in Appendix G, *infra*, 93a. General Motors Corporation's non-wholly owned subsidiaries are listed in Appendix H, *infra*, 97a.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
1. The 1981 Statute	2
2. Interpretation of the 1981 Statute	3
3. The 1987 Amendment	4
4. The *Romein* and *Gonzalez* Cases	5
5. The Court of Appeals' Decision	6
6. The Michigan Supreme Court's Decision	7
REASONS FOR GRANTING THE PETITION	9
I. THE CONTRACT CLAUSE PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT	10
A. Workers' Compensation Programs Create Contractual Interests Protected By The Contract Clause	11
B. The Impairment In This Case Violated The Contract Clause	14

		PAGE
	1. The Substantiality of the Impairment .	14
	2. The Legitimacy of the Public Purpose .	17
	3. The Reasonableness of the Means ...	19
C.	The Court's Balancing Test For Impairments Of Private Contracts Is Unfaithful To The Language And Purpose Of The Contract Clause	21
II.	THE DUE PROCESS CLAUSE PLACES SIGNIFICANT LIMITATIONS ON A STATE'S AUTHORITY TO ENACT RETROACTIVE LAWS THAT UPSET PARTIES' SETTLED EXPECTATIONS	24
A.	A Mere Finding Of A Rational Legislative Purpose Is Insufficient To Justify A Purely Retroactive Enactment That Interferes With Settled Expectations	25
B.	There Is A Temporal Point Beyond Which Retroactive Legislation Violates Due Process	28
CONCLUSION		30
APPENDICES A-H		1a-101a

TABLE OF AUTHORITIES

CASES:	PAGE
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978)	14, 18
Bank of Minden v. *Clement*, 256 U.S. 126 (1921) .	21
Barnes v. *Commissioner of Dep't of Human Services*, 567 A.2d 1339 (Me. 1989)	13
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	26
Brown v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984)	13
Carmichael v. *Workers' Compensation Court*, 234 Mont. 410, 763 P.2d 1122 (1988)	11
Chambers v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985)	3, 4, 5, 17
Chicago Bd. of Realtors v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987)	22, 23
City of El Paso v. *Simmons*, 379 U.S. 497 (1965) .	22
Commonwealth v. *Budd Co.*, 379 Pa. 159, 108 A.2d 563 (1954), app. dismissed, 349 U.S. 935 (1955) .	29
Cooper v. *Wicomico County*, 278 Md. 596, 366 A.2d 55 (1976)	11
Cooper v. *Wicomico County*, 284 Md. 576, 398 A.2d 1237 (1979)	19
Cudahy Co. v. *Parramore*, 263 U.S. 418 (1923) ..	12
Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819)	21
Doey v. *Howland Co.*, 224 N.Y. 30, 120 N.E. 53, cert. denied, 248 U.S. 574 (1918)	12
Douglass v. *County of Pike*, 101 U.S. 677 (1880) .	20

CASES: PAGE

Energy Reserves Group v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 14, 15, 18, 19, 21

Estate of Baker, 222 Kan. 127, 563 P.2d 431 (1977) .. 11

Fisk v. *Jefferson Police Jury*, 116 U.S. 131 (1885) . 16

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) ... 21

Franks v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985) 3, 16

Harris v. *National Truck Service*, 56 Ala. App. 350, 321 So. 2d 690 (1975) 11

Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 13, 19, 22

Injury to Spera, In re, 713 P.2d 1155 (Wyo. 1986) . 11

Jenkins v. *Sal Chemical Co.*, 280 S.E.2d 243 (W. Va. 1981) 13

K-Mart Corp. v. *State Industrial Ins. Sys.*, 101 Nev. 12, 693 P.2d 562 (1985) 13

Kaiser Found. Hosp. v. *Workers' Compensation Appeals Bd.*, 87 Cal. App. 3d 336, 151 Cal. Rptr. 368 (1978) 13

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 22

Lawrence v. *Anheuser-Busch, Inc.*, 523 A.2d 864 (R.I. 1987) 27

McAllister v. *Board of Educ.*, 79 N.J. Super. 249, 191 A.2d 212 (1963), aff'd, 42 N.J. 56, 198 A.2d 765 (1964) 13

McKesson Corp. v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) 26, 28

McNeese Constr. Co. v. *Harris*, 273 S.W.2d 355 (Ky. 1954) 11

CASES: PAGE

Miller v. *Norris Creameries*, 311 Minn. 343, 250 N.W.2d 161 (1976) 11

Minnesota Ass'n of Health Care Facilities v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985) 15

Mitchell v. *United States Fidelity & Guaranty Co.*, 206 F. Supp. 489 (E.D. Tenn. 1962) 11

Nacirema Co. v. *Johnson*, 396 U.S. 212 (1969) ... 12

New England Baptist Hosp. v. *United States*, 807 F.2d 280 (1st Cir. 1986) 30

Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir.), cert. denied, 484 U.S. 963 (1987) . 11

Noffsker v. *K. Barnett & Sons*, 72 N.M. 471, 384 P.2d 1022 (1963) 11

PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 16, 18, 25, 26, 27, 28

Prevost v. *Hess Oil Virgin Islands Corp.*, 640 F. Supp. 1220 (D.V.I. 1986), remanded, 819 F.2d 1237 (3d Cir.), cert denied, 484 U.S. 963 (1987) . 12, 13

Price v. *All American Engineering Co.*, 320 A.2d 336 (Del. 1974) 13

Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935) 25, 26

Selk v. *Detroit Plastic Products*, 419 Mich. 1, 345 N.W.2d 184, clarified, 419 Mich. 32, 348 N.W.2d 652 (1984) 13

Spengler v. *Employers Commercial Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974) . 11

State ex rel. Briggs & Stratton Corp. v. *Noll*, 100 Wis. 2d 650, 302 N.W.2d 487 (1981) 28

CASES: PAGE

State Industrial Comm'n v. *Nordenholt Corp.*, 259 U.S. 263 (1922) 11, 12

Temple Univ. v. *United States*, 769 F.2d 126 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986) .. 29

Thomas v. *Parker Rust Proof Co.*, 284 Mich. 260, 279 N.W. 504 (1938) 13

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 13, 14, 15, 18, 23

United States v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989) . 27

United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989) 25

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 25, 26, 27

Van Emmerik v. *Janklow*, 454 U.S. 1131 (1982) .. 29, 30

Veix v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) 22

Washington Nat'l Arena Limited Partnership v. *Treasurer*, 287 Md. 38, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980) 29

Welch v. *Henry*, 305 U.S. 134 (1938) 28

Wood v. *J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979) 13

STATUTES:

Mich. Comp. Law 418.351 3

Mich. Comp. Law 418.352 3

Mich. Comp. Law 418.354 3

Mich. Comp. Law 418.358 3

Mich. Comp. Law 418.833 16

STATUTES: PAGE

1980 Mich. Public Acts 357 3

1981 Mich. Public Acts 203 3

1987 Mich. Public Acts 28 ..... 5, 29

MISCELLANEOUS:

Federalist No. 44 (C. Rossiter ed. 1961) 9, 21

Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) 27

Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L. Q. 525 (1987) 23

McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267 (1988) 21, 23

SB67, introduced May 7, 1987, 1987 Journal of the House 1062-1063 16

J. Story, *Commentaries on the Constitution of the United States* (R. Rotunda & J. Nowak eds. 1987) 21

B. Wright, *The Contract Clause of the Constitution* (1938) 21

Petitioners General Motors Corporation (GM) and Ford Motor Company (Ford) petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan.

OPINIONS BELOW

The decision of the Supreme Court of Michigan (App., *infra*, 1a-57a) is reported at 436 Mich. 515, 462 N.W.2d 555. The decision of the Michigan Court of Appeals (App., *infra*, 58a-69a) is reported at 168 Mich. App. 444, 425 N.W.2d 174.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 28, 1990 (App., *infra*, 1a), and a petition for rehearing was denied on December 5, 1990 (App., *infra*, 72a). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and the Michigan workers' compensation statute are set forth at App., *infra*, 88a-92a.

STATEMENT

From 1982 to 1987, petitioners—employers in the State of Michigan—satisfied their contractual obligations to pay workers' compensation benefits to disabled employees by making full payments in the amounts provided by state statute, as authoritatively construed by the Supreme Court of Michigan. In 1987, however, the Michigan legislature, expressly disagreeing with the state supreme court's construction of state law, enacted a new statute that retroactively increased the amount of workers' compensation benefits for payment periods back to 1982. The issue in this case is whether the 1987 law, imposing massive un-

foreseen financial liabilities on employers, is consistent with the requirements of the Contract Clause and the Due Process Clause of the United States Constitution.

1. *The 1981 Statute.* During the late 1970s and early 1980s the State of Michigan was mired in an economic crisis. As Chief Justice Riley described the situation: "Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent, and the 1981 inflation rate for the City of Detroit in 1981 was 9.3 percent." App., *infra*, 31a-32a (Riley, C.J., dissenting) (footnotes omitted). It was against this economic backdrop that the Michigan legislature in 1981 passed a series of amendments to the Michigan Workers' Compensation Act. These changes were designed to curb expensive abuses in the system and thereby to "stimulate a poor state economy by lowering the cost of doing business in Michigan." *Id.* at 31a.

The primary abuse that the 1981 statute addressed was the ability of retired employees to collect workers' compensation benefits in addition to retirement benefits, and thereby to earn more money "disabled" than they would have received if they had never been injured. As the Michigan Supreme Court explained:

> "For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called 'retiree problem.' * * * If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. * * * In 1973 the Big Three (General Motors, Ford and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. * * * With such a large part

> of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded."

Franks v. *White Pine Copper Div.*, 375 N.W.2d 715, 724 (Mich. 1985) (quoting official state study; citation omitted). Indeed, in 1981, Michigan Governor William Milliken called the "retiree problem" the "biggest single liability to Michigan's job climate today." *Id.* at 723.

The Michigan legislature responded to this crisis by enacting 1981 PA 203 on December 30, 1981. This statute amended MCL 418.354 to provide for the "coordination" of workers' compensation benefits with various other employee benefit programs funded by employers.[1] For example, the 1981 statute allowed employers to offset workers' compensation payments by the amounts that an employee was otherwise receiving from employer-financed pension plans, employer contributions to social security, or payments received from an employer-provided disability policy. Because of the coordination of benefits, employees would no longer be allowed to "receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job." *Franks*, 375 N.W.2d at 723.

2. *Interpretation of the 1981 Statute.* In *Chambers* v. *General Motors Corp.* (reported together with *Franks* at 375 N.W.2d 715 (Mich. 1985)), the Michigan Supreme Court reviewed the plain language and history of the 1981

---

[1] This statute was one of a series of reforms Michigan instituted during 1980 and 1981. For example, in 1980, the legislature provided for coordination of workers' compensation benefits with unemployment benefits. See 1980 PA 357, MCL 418.358. Also in 1980 the legislature raised the maximum disability benefit for employees injured after January 1, 1982. See MCL 418.351. Another provision of the 1980 amendments created a state-funded cost-of-living supplement for employees injured between 1965 and 1979. See MCL 418.352. These supplemental benefits are not subject to coordination.

statute and held unanimously that the coordination provision applied to all workers' compensation payments made for disability periods *after* the statute's effective date of March 31, 1982, regardless of the date of the employee's injury. The court explained that coordination of future payments did not constitute a retrospective interference with any rights of the employees, because workers' compensation focuses on the workers' needs and status as of each new payment period. See *Chambers*, 375 N.W.2d at 722 (" 'it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of *all* disabled workers should be *prospectively* coordinated after the effective date of the enactment *regardless of when they were injured.*' " (emphasis in original) (citation omitted)).

At the same time, however, the Michigan Supreme Court announced that employers could not reduce payments that they still owed employees for disability periods occurring *before* the coordination provision's effective date of March 31, 1982. To allow this type of retrospective coordination, the court explained, would be to retroactively adjust payments that were "due" and thus "payable" prior to the effective date of the statute. *Chambers*, 375 N.W.2d at 730.

3. *The 1987 Amendment.* During the mid-1980s, the economic climate in Michigan improved considerably. As Chief Justice Riley observed, in 1987 "[t]he level of unemployment was 8.2 percent (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent (down from the 1981 level of 9.3 percent)." App., *infra*, 35a (footnotes omitted). Moreover, the Michigan legislature in 1987 was quite different from the one that had passed the coordination provision in 1981. Only 11 of the 26 senators and 20 of the 62 representatives who had voted for the 1981 statute were still in office. See *id.* at 36a.

In this changed economic and political environment, and with the sponsorship and support of organized labor, the

Michigan legislature revisited the coordination issue in 1987 and enacted an amendment to the workers' compensation statute designed to overrule the Michigan Supreme Court's decision in *Chambers* and to disallow coordination of benefits for employees who had been injured prior to the 1981 statute's effective date of March 31, 1982. See App., *infra*, 90a-92a. The amendment explicitly declared:

> The decision of the Michigan Supreme Court in [*Franks* and *Chambers*] is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability * * * for personal injuries occurring before March 31, 1982.

1987 PA 28, section 354, subsection 17.

The 1987 amendment did far more, however, than merely abolish coordination of *future* workers' compensation payments for employees disabled prior to March 31, 1982. The 1987 legislature also repealed the 1981 coordination provision *retroactively* by requiring employers to make *refunds*, with interest, to all employees whose benefits had been coordinated during the five-year period that the 1981 statute was in effect. See 1987 PA 28, section 354, subsections 19 & 20. Employers were given 60 days to make these massive refunds, which in the case of petitioners GM and Ford alone could amount to nearly $25 million. See App., *infra*, 53a (Griffin, J., dissenting). The constitutionality of this extraordinary new measure was challenged in a series of cases that culminated in the cases now before the Court.

4. *The Romein and Gonzalez Cases.* Evert Romein was injured in 1977 during his employment with General Motors. Prior to the 1981 statute, Romein received social security and pension benefits, as well as workers' compensation benefits on account of his disability. After the effective date of the 1981 statute, GM informed Romein that it would begin coordinating his workers' compensation

benefits with these other employer-financed payments. Romein challenged this decision, and an administrative law judge ruled in his favor, holding that the coordination provision applied only to employees who were injured after its effective date of March 31, 1982. By the time the case was heard by the Workers' Compensation Appeal Board (WCAB), the Michigan Supreme Court had already rejected this argument in *Chambers*, and the WCAB therefore ruled that GM was entitled to coordinate payments to Romein for periods after the 1981 statute's effective date. App., *infra*, 74a-80a.

Arturo Gonzalez, a Ford employee, began to receive workers' compensation benefits on January 1, 1981. On August 9, 1982, Ford informed Gonzalez that his benefits would be reduced in light of the 1981 statute. In September 1984, however, an administrative law judge ruled against Ford, holding that the coordination provision could not be applied to pre-1982 injuries. The WCAB affirmed. The Board concluded that although *Chambers* had construed the 1981 statute to permit the coordination of Gonzalez' benefits, that decision had been "reversed" by the 1987 amendment. App., *infra*, 81a-87a.

5. *The Court of Appeals' Decision.* *Romein* and *Gonzalez* were consolidated by the Michigan Court of Appeals, because they raised the identical issue: the constitutionality of the 1987 amendment, which retroactively required employers to reopen closed workers' compensation claims and to make additional payments, with interest, in excess of the amounts they were legally obliged to pay between March 31, 1982 and May 14, 1987, the date the 1987 amendment was enacted. The court rejected GM's and Ford's contentions that retroactive application of the 1987 amendment violated the Due Process and Impairment of Contracts Clauses of the United States Constitution. App., *infra*, 64a-66a. The court reasoned that "[t]he right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was

revoked by the Legislature. What the Legislature gave, it could take away." *Id.* at 66a.

6. *The Michigan Supreme Court's Decision.* A divided Michigan Supreme Court affirmed. The majority first rejected petitioners' contention that the 1987 amendment violated due process. In the court's view, GM and Ford acquired no "vested rights" in the level of payments they had made because "workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature." App., *infra*, 13a. The court recognized that the

> employers in this case held an expectation that the payments [made between 1982 and 1987] were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not.

Id. at 9a. The court found such a "rational relationship" by hypothesizing that the legislature may have wanted to ensure that employees who were not covered by a 1980 statute that increased benefits for injuries occurring after 1982 would not have their benefits subjected to coordination. *Ibid.*

The Michigan Supreme Court also rejected petitioners' argument that the 1987 amendment worked an unconstitutional impairment of the contractual arrangements between the employers and their employees. The court first ruled that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." App., *infra*, 14a. Even if the Contract Clause applied, however, the court concluded that the 1987 legislation would survive scrutiny. To begin with, the court held that any impairment caused by the statute was not "substantial" because it did not destroy the "basic

benefit" that employers received from the workers' compensation scheme—immunity from tort actions by their employees. *Id.* at 15a. In addition, the court suggested that any impairment was diminished by the "highly regulated" nature of the employment relationship. *Id.* at 15a-16a.

The Michigan Supreme Court next considered whether any impairment of contract could be justified by a "legitimate public purpose" and concluded that "[t]here is a significant state interest in protecting the right of disabled employees." App., *infra*, 16a. Speculating again on the motivation for the 1987 amendment, the court stated that "[t]he Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

Finally, the Michigan Supreme Court considered the "means by which the contracting parties' rights and responsibilities [were] adjusted" and determined that "[t]he means chosen here are reasonable in the light of deference given to legislative action." App., *infra*, 17a. The court explained that "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Justice Brickley "reluctantly" concurred in the judgment. He stated that

> [t]roubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment.

App., *infra*, 22a.

Justice Griffin dissented, based on his "strong view" that the 1987 amendment "contravenes the United States Constitution's Fourteenth Amendment due process guarantee." App., *infra*, 47a. After reviewing some of the retroactive enactments that have survived judicial scrutiny in the past, Justice Griffin remarked that the "[l]egislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to * * * coordination regardless of the date of injury." *Id.* at 50a.

REASONS FOR GRANTING THE PETITION

The Framers of the Constitution were justifiably concerned with "the fluctuating policy which has directed the public councils." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). Accordingly, they included the Contract Clause and the Due Process Clause in the Constitution to protect against legislative interference with settled legal rights. Under the Michigan Supreme Court's analysis, however, there are no constitutional barriers to a legislative enactment that changes previously settled law and imposes unforeseen liability on parties who have contracted or otherwise shaped their behavior in reliance on that law. If, as the court below held, mere "rationality" is the test for evaluating such measures, then virtually any enactment—even one as disruptive of past transactions and expectations as the 1987 amendment—would be immune from constitutional scrutiny.

Review is warranted here because the Michigan Supreme Court's decision cannot be squared with this Court's precedents, conflicts with the decisions of other courts on the applicability of the Contract Clause in the workers' compensation context, and exacerbates the confusion in the lower courts on the standards for judging retroactive

legislation. The need for review is especially acute with respect to the Contract Clause. The lower courts have gotten the mistaken message in recent years that the Contract Clause no longer poses any meaningful impediment to retroactive impairments of contractual obligations. The Court should use this occasion to reaffirm the principle, true to the text and history of the Clause, that any state enactment interfering with settled contract rights must satisfy an extremely heavy burden.

Prior to the repeal of this Court's appellate jurisdiction, this case would have qualified for plenary review, because a state court has rejected a federal constitutional attack on the validity of a state statute. See 28 U.S.C. § 1257(a) (1988). Even though review of such cases is no longer mandatory, this factor should still be an appropriate one in shaping the Court's exercise of discretion when the case raises significant constitutional issues, as this one decidedly does.

I. THE CONTRACT CLAUSE PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT.

The Michigan Supreme Court gave two reasons for rejecting petitioners' Contract Clause challenge to the 1987 amendment. First, the court held that the Contract Clause does not apply to retroactive modifications of workers' compensation laws, even though workers' compensation benefits are generally recognized as contractual in nature. Second, the court held that even if there was an impairment of contract, it was insubstantial and was justified by a legitimate state interest. Both of these conclusions are severely flawed and reflect the disarray and confusion that currently confront the lower courts in trying to apply this Court's Contract Clause jurisprudence.

A. Workers' Compensation Programs Create Contractual Interests Protected By The Contract Clause.

The Michigan Supreme Court's initial conclusion—that there is no constitutionally protected contractual interest at stake here—is in direct conflict with a substantial line of federal and state precedents recognizing that the Contract Clause governs retroactive statutory modifications in the workers' compensation area. In *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1244 (3d Cir. 1987), for example, the Third Circuit held that the Contract Clause was violated by a retroactive amendment to the Virgin Islands Workmen's Compensation Act because the amendment "substantially impair[ed] * * * implied contracts of employment." See also, *e.g.*, *Mitchell* v. *United States Fidelity & Guaranty Co.*, 206 F. Supp. 489, 490 (E.D. Tenn. 1962); *Harris* v. *National Truck Service*, 321 So. 2d 690, 693-694 (Ala. App. 1975); *Spengler* v. *Employers Commercial Union Ins. Co.*, 206 S.E.2d 693 (Ga. App. 1974); *Estate of Baker*, 563 P.2d 431 (Kan. 1977); *McNeese Constr. Co.* v. *Harris*, 273 S.W.2d 355, 357 (Ky. 1954); *Cooper* v. *Wicomico County*, 366 A.2d 55, 58 (Md. 1976); *Miller* v. *Norris Creameries*, 250 N.W.2d 161, 162 (Minn. 1976); *Carmichael* v. *Workers' Compensation Court*, 763 P.2d 1122 (Mont. 1988); *Noffsker* v. *K. Barnett & Sons*, 384 P.2d 1022, 1023 (N.M. 1963); *In re Injury to Spera*, 713 P.2d 1155, 1156-1157 (Wyo. 1986).

The analysis generally employed by these courts is consistent with this Court's conclusion in *State Industrial Comm'n* v. *Nordenholt Corp.*, 259 U.S. 263 (1922), that an award of workers' compensation is made

> "upon the theory that the statute giving the commission power to make an award *is read into and becomes a part of the contract.* The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a cer-

> tain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment."

Id. at 271 (emphasis added) (quoting *Doey* v. *Howland Co.*, 120 N.E. 53, 54 (N.Y. 1918)). See also *Nacirema Co.* v. *Johnson*, 396 U.S. 212, 215 n.7 (1969) ("workmen's compensation act combines elements of both tort and contract").[2]

This analysis is surely correct. Workers' compensation statutes are not general police power regulations that govern businesses without regard to their contractual agreements to employ workers. Rather, workers' compensation laws come into play only after an employer and employee have entered into an employment agreement that triggers the act's provisions. The workers' compensation scheme then becomes part of the contractual agreement as much as if the parties had themselves included the terms on the face of their employment contract.[3] As this Court has stated:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the mak-

[2] To be sure, there is some tension between these descriptions and the one offered by the Court in *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 423 (1923), which referred to workers' compensation legislation as resting on the idea of status, not contract. This tension is one of the principal sources of the disarray that continues to pervade the lower courts. See *Prevost* v. *Hess Oil Virgin Islands Corp.*, 640 F. Supp. 1220, 1223 n.7 (D.V.I. 1986).

[3] Indeed, many employment contracts in Michigan (including the collective bargaining agreement between GM and the United Auto Workers) explicitly incorporate various workers' compensation provisions, with modifications as agreed to by the parties. See, *e.g.*, Supplemental Agreement Covering Pension Plan, Art. IV, Sec. 2, Appendix A to Agreement Between GM and UAW (Mar. 21, 1982).

> ing of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' "

United States Trust Co. v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977) (quoting *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934)).[4]

Nonetheless, a substantial number of courts have rejected this approach and have held that the Contract Clause does not govern retroactive impairments of obligations in the workers' compensation area. See, *e.g.*, *Kaiser Found. Hosp.* v. *Workers' Compensation Appeals Bd.*, 151 Cal. Rptr. 368, 376 (App. 1978); *Price* v. *All American Engineering Co.*, 320 A.2d 336, 339-340 (Del. 1974); *Barnes* v. *Commissioner of Dep't of Human Services*, 567 A.2d 1339 (Me. 1989); *K-Mart Corp.* v. *State Industrial Ins. Sys.*, 693 P.2d 562, 565-567 (Nev. 1985); *McAllister* v. *Board of Educ.*, 191 A.2d 212, 217-218 (N.J. Super. 1963), aff'd, 198 A.2d 765 (N.J. 1964); *Wood* v. *J.P. Stevens & Co.*, 256 S.E.2d 692 (N.C. 1979); *Jenkins* v. *Sal Chemical Co.*, 280 S.E.2d 243, 244 (W. Va. 1981).

The severity of the conflict among the lower courts on this issue is beyond question. See *Prevost*, 640 F. Supp. at 1223 ("[j]urisdictions, including the Supreme Court, appear evenly divided between these two theories and we find no clear trend in either direction"). It is equally apparent that this is a conflict that demands the Court's attention. Millions of employers and employees are affected by workers' compensation statutes on a continuing basis. It is essential to know whether state laws may alter those contractual relationships retroactively—such as by

[4] The Michigan courts generally recognize that the terms of the workers' compensation statute become part of the contract of employment. See, *e.g.*, *Selk* v. *Detroit Plastic Products*, 345 N.W.2d 184, 188, clarified, 348 N.W.2d 652 (Mich. 1984); *Thomas* v. *Parker Rust Proof Co.*, 279 N.W. 504 (Mich. 1938); *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322 (Mich. App. 1984).

increasing (or decreasing) the benefits due for a prior time period after full payment has been made in accordance with the law then in effect. Guidance from this Court is sorely needed.

B. The Impairment In This Case Violated The Contract Clause.

Perhaps because it recognized the tenuousness of its conclusion that no contractual interest was at stake here, the Michigan Supreme Court proceeded to evaluate whether the impairment caused by the 1987 amendment could be justified under the Contract Clause test that this Court has adopted over the past few decades. See App., *infra*, 15a-17a. In these cases, the Court has balanced the substantiality of the contractual impairment (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978)), the legitimacy of the public purpose for the impairment (*Energy Reserves*, 459 U.S. at 412), and the reasonableness of the means chosen to serve that purpose (*United States Trust Co.*, 431 U.S. at 25).

As we explain below (see pages 21-23, *infra*), we question whether this formulation is faithful to the plain language or original understanding of the Contract Clause. But the statute at issue here cannot satisfy even this watered-down standard of review.

1. *The Substantiality of the Impairment.* Despite the fact that the 1987 amendment could cost GM and Ford $25 million in additional workers' compensation payments for *closed benefit periods*, the Michigan Supreme Court concluded that the impairment here was not "substantial." App., *infra*, 15a. To begin with, the court below observed that petitioners continued to receive the "basic benefit" of the workers' compensation scheme—immunity from employees' common law tort claims. "Since the impairment complained of in this case does not alter this basic

benefit to the employer, it cannot be said to be substantial." *Ibid.* This analysis is nonsensical because it would presumably allow the legislature to impose any amount of retroactive workers' compensation liability on an employer provided that it did not make the employer subject to a tort suit. Moreover, the state court's reasoning is flatly inconsistent with this Court's statement that "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group*, 459 U.S. at 411 (citing *United States Trust Co.*, 431 U.S. at 26-27). Rather, the inquiry into substantiality involves an assessment of the "legitimate expectations of the contracting parties." 431 U.S. at 20 n.17.

If the Michigan Supreme Court had engaged in the proper inquiry, it would have been forced to recognize that the 1987 amendment upset settled expectations and deprived employers of a significant part of their contractual bargain. In light of the 1981 statute, particularly as construed by the state's highest court in *Chambers*, employers plainly were entitled to rely on the fact that the coordinated workers' compensation payments they made between 1982 and 1987 fully satisfied their contractual obligations. See *Minnesota Ass'n of Health Care Facilities* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (upholding prospective adjustment but striking down retroactive adjustment in nursing home rates under the Contract Clause because it imposed "totally unexpected liability on nursing homes for charges that were permitted by law when collected" and thus "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"). In fact, employers in Michigan relied on those expectations in making a variety of financial decisions, particularly those involving the allocation of employee compensation. See note 3, *supra*. By retroactively prohibiting coordination between 1982 and 1987 for a large category of former employees, the 1987 amendment imposed unexpected liabilities and worked a serious impairment of contract.

The second basis for the Michigan Supreme Court's conclusion is equally defective. The court held that there was no substantial impairment because the "workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation * * * [so that the] defendants knew that their rights were subject to alteration." App., *infra*, 16a. But the fact that employment may be highly regulated does not mean that the contracting parties cannot maintain a reasonable expectation of finality with respect to fully satisfied claims for past periods of disability. Indeed, the workers' compensation statute itself creates such expectations: for example, although the legislature retains the power to alter benefit levels *prospectively*, the statute expressly provides that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]." MCL 418.833(1); see also *Franks*, 375 N.W.2d at 730 (refusing to allow retroactive coordination of benefits for pre-1982 periods). In the 75-year history of workers' compensation in Michigan, this was the first time the legislature had ever sought to reopen past claim periods to increase employer liability. Thus, Michigan employers had a justifiable expectation that, although their liability for *future* pay periods might be altered, their liability for *past* periods could not be retroactively increased. See *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131, 133-134 (1885).[5]

[5] Michigan employers had no reason to anticipate that the legislature might enact a law requiring retroactive reimbursements of amounts they had lawfully withheld. To begin with, the 1982 legislature had actually defeated a proposal to amend the 1981 statute and to disallow prospective coordination for those injured prior to 1982. See App., *infra*, 36a-37a (Riley, J., dissenting). Moreover, even the 1987 amendment did not contain a retroactive reimbursement clause (much less a five-year retroactivity clause) until eight days prior to its enactment. See SB67, introduced May 7, 1987, 1987 Journal of the House 1062-1063. Compare *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (emphasizing fair notice to industry and the reasonableness of a five-month retroactivity period).

According to the Michigan Supreme Court, however, the only time an employer has a protected expectation that it has fully satisfied its workers' compensation obligation for a past period is when a judgment has been entered adjudicating the employer's liability for that period. App., *infra*, 14a. This conclusion ignores the fact that once the 1981 statute was passed, and certainly once the coordination issue was authoritatively decided in the employers' favor in *Chambers*, there was no reason for employers or employees to litigate the issue, and hence there were no "judgments entered under former law" in the great majority of cases.[6] In sum, employers had well-settled expectations of finality when they made workers' compensation payments in the exact amount prescribed by state statute, without the need for further administrative or judicial review.

2. *The Legitimacy of the Public Purpose.* Because the 1987 amendment substantially impaired petitioners' contractual relationships, the validity of the statute turns on the Michigan Supreme Court's rather nonchalant conclusion that the enactment was justified by a "legitimate public purpose." App., *infra*, 16a. In the Michigan court's view, this burden was satisfied because, "rather than merely providing a benefit to special interests, the state is validly exercising its police power. There is a significant state interest in protecting the right of disabled employees to receive the full compensation intended by

[6] Indeed, it was the Michigan Supreme Court's own decision in *Chambers* that held that employers need not invoke any judicial process—and hence need not acquire any final judgment—before beginning to coordinate their employees' benefits. See 375 N.W.2d at 726 ("the Legislature has provided that the employer may coordinate benefits without prior administrative approval"). It is perverse to conclude that those employers who followed the law and procedure explicitly approved by the state's highest court possessed no reasonable expectations simply because their unquestioned legal rights were never reduced to judgment. See App., *infra*, 53a (Griffin, J., dissenting).

the Legislature in return for the relinquishment of their tort claim." *Ibid.*

This assertion is plainly insufficient to satisfy the demands of the Contract Clause. As this Court explained in *Spannaus*, "[i]f the Contract Clause is to retain any meaning at all * * * it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." 438 U.S. at 242; see also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 732-733 (1984) ("we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses"); *United States Trust Co.*, 431 U.S. at 22 (even "private contracts are not subject to unlimited modification under the police power"). Nothing in the state court's decision, which looked no further than the "legitimate state interest" (App., *infra*, at 17a), shows any sensitivity to this point.

Indeed, in many respects the 1987 amendment was the very type of legislation designed to benefit a discrete and narrow class that the Court has held to violate the Contract Clause. See *Spannaus*, 438 U.S. at 247; see also *Energy Reserves Group*, 459 U.S. at 412 (Court must ensure that the state is not simply "providing a benefit to special interests"). The 1987 statute did not constitute general legislation that only incidentally affected obligations under various types of private contracts. To the contrary, as Justice Griffin noted in dissent (App., *infra*, 50a), the statute was "deliberately designed to disrupt retroactively past transactions" between employers and employees. Nor was the 1987 amendment enacted to address any real emergency. To the contrary, it was the *1981 statute* that was passed to deal with a serious economic problem—employees were "double-dipping" to such an extent that they were driving employers from the State and creating an economic crisis. The 1987 statute perpetuated

this "double-dip."[7] Nor was there any suggestion that the 1987 amendment was necessary to avoid destitution. To the contrary, the beneficiaries of the legislature's largesse were already receiving a full array of social security and retirement benefits. By virtue of the 1981 law, the principle of coordination is the regime applicable to every Michigan employee receiving workers' compensation benefits in the future—with the exception of the special class favored by the 1987 amendment. In sum, the 1987 statute was "not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions" in cases such as *Blaisdell*. See *Spannaus*, 438 U.S. at 249; *Cooper* v. *Wicomico County*, 398 A.2d 1237, 1241 (Md. 1979) ("simply to increase the amount of a previously finalized award of compensation to meet the employee's 'generalized need for funds' would appear to rest on a tenuous constitutional foundation").

3. *The Reasonableness of the Means.* The Michigan Supreme Court's final conclusion was that the means chosen by the legislature were reasonable because the 1987 "statute imposes no more retroactive liability than is necessary to" effectuate its goal. App., *infra*, 17a. Even a cursory examination of the 1987 amendment, however, reveals that it was not a reasonable way of dealing with any problem that may have faced employees whose benefit levels were not increased by the unrelated statutory changes that took effect at the beginning of 1982. In fact, the fit is so poor that it is doubtful that the 1987 amendment was designed to deal with this issue at all.

---

[7] The lack of any legislative record tying the 1987 amendment to any pressing public need is reason itself to reject the Michigan Supreme Court's hypothetical assumption that the legislature may have been seeking to help those employees whose benefit rates were not increased in 1982. See *Spannaus*, 438 U.S. at 247 ("there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem").

The court below stated that the 1987 amendment was intended to eliminate coordination of benefits, retroactive to 1982, for employees "whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." App., *infra*, 17a. Yet the 1987 statute helped only the least deserving subset of employees injured prior to 1982—those who were able to double-dip into workers' compensation and retirement benefits. Surely, if the legislature had intended to assist employees whose benefits were not increased in 1982, the 1987 statute would not have been so arbitrarily limited. Instead, it would have more broadly increased the benefit levels of *all* employees who were injured prior to 1982. In any event, contrary to the Michigan court's critical assumption, many of the retirees who benefited from the 1987 amendment had in fact received substantial, non-coordinated increases (ranging from 10.3% to 86.6%) in their workers' compensation benefits in 1982 under the supplemental compensation scheme that went into effect that year. See note 1, *supra*. If the goal had been to help only those employees who were not receiving increased benefits, then extension of the supplemental benefit program—not retroactive non-coordination—would have been the rational means of accomplishing that end.

Thus, the 1987 amendment was hardly a legislative reaction to a sudden and unanticipated social or economic problem, but was shaped entirely to reverse a policy decision that had been made in the 1981 statute, as authoritatively interpreted by the state supreme court. The 1987 legislature was entitled to have a change of heart about whether coordination of benefits should be allowed for employees injured prior to 1982. But when it had such a change of heart, it had a constitutional duty to "make it prospective, but not retroactive." *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880).

C. The Court's Balancing Test For Impairments Of Private Contracts is Unfaithful To The Language And Purpose Of The Contract Clause.

Although the Michigan Supreme Court's ruling should be reversed under this Court's precedents construing the Contract Clause, the amorphous balancing approach evidenced by the decision below unfortunately finds some support in this Court's decisions in recent years. Given the Court's increasing concern about fidelity to the language, history, and purpose of constitutional provisions, this is an appropriate occasion to reconsider the direction that the Contract Clause cases have taken and to restore the Clause to its proper place in the constitutional scheme.

During the first 150 years of the Nation's history, the Contract Clause, consistent with its unequivocal language and the intent of the Framers, was construed as a virtually absolute bar on retroactive impairments of contractual obligations. See, *e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Bank of Minden* v. *Clement*, 256 U.S. 126 (1921). Indeed, as this Court has noted, during the first century of our Constitution the Contract Clause was "perhaps the strongest single constitutional check on state legislation." *Spannaus*, 438 U.S. at 241. There is an extraordinary amount of evidence that confirms the message of the Contract Clause's plain and absolute text and demonstrates how central a role the Framers envisioned for this provision.[8]

---

[8] See, *e.g.*, *Federalist* No. 44 (Madison), at 282 ("Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation"); J. Story, *Commentaries on the Constitution of the United States* 505 (R. Rotunda & J. Nowak eds. 1987) ("The great object of the framers of the constitution undoubtedly was, to secure the inviolability of contracts. * * * The prohibition was universal"). See generally B. Wright, *The Contract Clause of the Constitution* 3-27 (1938); McConnell, *Contract*

(Footnote continued on following page)

The Court modified this approach in *Home Building & Loan Ass'n* v. *Blaisdell*, *supra*, in which, by a 5-4 vote, it upheld an emergency moratorium on mortgage foreclosures in response to the post-depression crisis facing the State of Minnesota. But *Blaisdell* itself was a limited departure: the Court repeatedly stressed the emergency nature of the provision and treated the case as one requiring it to "consider the relation of emergency to constitutional power." 290 U.S. at 425.

Notwithstanding the limited nature of *Blaisdell*, the Court proceeded over the subsequent few decades to expand the exception to the Contract Clause. See, *e.g.*, *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987). See generally *City of El Paso* v. *Simmons*, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (the Court has "balance[ed] away the plain guarantee of Art. I, § 10, that 'No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .' "); *Chicago Bd. of Realtors* v. *City of Chicago*, 819 F.2d 732, 743-744 (7th Cir. 1987) (Posner and Easterbrook, JJ., concurring) (after *Blaisdell*, the Court "so fictionalized the concept of an 'emergency' that by 1978 the Court found it necessary [in *Spannaus*] to remind bench and bar that the contract clause was 'not a dead letter' "). Describing the Court's trend toward upholding impairments of contracts that satisfy the "reasonableness" standard, one pair of commentators has explained:

> The Framers * * * knew how to phrase prohibitions in terms of reasonableness, as shown by the Fourth Amendment's prohibition against "unreasonable searches and seizures." The Contract Clause is phrased in absolute terms and is grouped with other absolute prohibitions such as the Bill of Attainder and Ex Post Facto Clauses designed to protect the rule of law. Therefore, a contract clause jurisprudence that adheres to the original understanding must either strike down all retrospective impairments or, like first amendment jurisprudence, create an exceedingly stringent standard of review that only the most compelling demonstrations of necessity will satisfy.

Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L. Q. 525, 544 (1987). As Judge Posner has written: "Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it now interprets the contract clause." *Chicago Bd. of Realtors*, 819 F.2d at 744.

The Court should return the Contract Clause to its constitutional moorings. To begin with, the Court should reconsider the dichotomy it has created between the scrutiny afforded public and private contracts (see *United States Trust Co.*, 431 U.S. at 22-23), because the historical record conclusively shows that "it is interference with *private* contracts that lies at the heart of the clause." McConnell, 76 Cal. L. Rev. at 294 (emphasis added). Furthermore, for both public and private agreements, a state should not be "completely free to consider impairing the obligations of * * * contracts on a par with other policy alternatives." *United States Trust Co.*, 431 U.S. at 30-31. Rather, in light of the language and history of the Contract Clause, any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was "essential to the achievement of an important state purpose." *Id.* at 32 (Burger, C.J., concurring). The contractual impairment here—involving the unprecedented retroactive reopening of obligations years after they had been paid in full, and years after the time for challenging them had expired—could not possibly withstand that scrutiny.

[8] *continued*
Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Cal. L. Rev. 267 (1988).

II. THE DUE PROCESS CLAUSE PLACES SIGNIFICANT LIMITATIONS ON A STATE'S AUTHORITY TO ENACT RETROACTIVE LAWS THAT UPSET PARTIES' SETTLED EXPECTATIONS.

In holding that the 1987 amendment satisfied the requirements of the Due Process Clause, the Michigan Supreme Court purported to rely on past decisions of this Court. In fact, however, the court failed to give effect to this Court's repeated admonition that the Due Process Clause is particularly concerned with retroactive enactments that disturb past transactions and reasonable expectations. Based only on the most minimal scrutiny, the Michigan court upheld an enactment that, as Justice Griffin noted in dissent, was "deliberately designed to disrupt retroactively past transactions completed in reliance upon" a state statute as authoritatively construed by a state supreme court. App., *infra*, 50a. *No* decision of this Court (or, to our knowledge, of any other court) has ever held that a state may impose *five years* of retroactive monetary liabilities on parties that have so justifiably relied on prior law.

The Michigan court's approach might well be attributed to the dearth of practical guidance found in this Court's prior cases. Although this Court's decisions have emphasized that something more than mere rationality is required to sustain retroactive legislation, the Court has not adequately defined what additional justification is required or how courts should carry out the necessary inquiry. In view of what Justice Brickley referred to as "the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation" (App., *infra*, 22a (Brickley, J., concurring)), this Court should grant review and clarify the ambiguities in its due process jurisprudence.

A. A Mere Finding Of A Rational Legislative Purpose Is Insufficient To Justify A Purely Retroactive Enactment That Interferes With Settled Expectations.

The Michigan Court premised its due process holding on two decisions of this Court: *PBGC* v. *Gray*, *supra*, and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Those decisions stand for the proposition that legislation imposing *prospective* liability for past acts may be consistent with due process. See also *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989). At the same time, however, the cases stress that the Due Process Clause demands special justification for retroactive modifications of past transactions. See *Gray*, 467 U.S. at 733; *Turner Elkhorn*, 428 U.S. at 17.

Moreover, both *Gray* and *Turner Elkhorn* specifically left open the continuing vitality of *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which invalidated retroactive legislation requiring employers to finance pensions for former railroad employees who, while not employed by a railroad at the time of the statute's enactment, had been so employed during the prior year. See *id.* at 345, 349; *id.* at 389 (Hughes, C.J., dissenting) (agreeing with the Court that this portion of the legislation was unconstitutional). The Court in *Turner Elkhorn* distinguished *Alton* on the ground that, unlike the discredited railroad pension legislation, "[t]he point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored." 428 U.S. at 19. See also *Gray*, 467 U.S. at 733.

Alton is squarely on point here. The 1987 amendment was not a response to "a specific need created by the dangerous conditions under which the former employee labored." The most that the Michigan Supreme Court

could say was that the law was designed simply as a substitute for a general cost of living increase in benefit levels. App., *infra*, 9a. And by its terms, the amendment does nothing more than ensure that retirees receive full pension *and* full workers' compensation benefits—in effect, as in *Alton*, "increas[ing] or supplement[ing] a former employee's salary to meet his generalized need for funds."

The Michigan Court seemed to believe that *Turner Elkhorn* and *Gray* dispensed with the need for careful analysis of the 1987 statute's constitutionality. That approach is attributable in part to this Court's failure to articulate specific criteria for reviewing due process attacks on retroactive enactments. On the one hand, the Court has repeatedly stressed that the "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17. Consistent with this formulation, the Court has declared that "the justification for the retrospective imposition of liability must take into account the possibilit[y] that * * * conduct may have been taken in reliance upon the current state of the law." *Ibid.* As Justice Scalia recently observed, the constitutionality of retroactive legislation "has been conditioned upon a rationality requirement beyond that applied to other legislation." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring). And again last Term, in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2228, 2252 n.23 (1990), the Court suggested that some retroactive increases in taxation could violate "due process by unduly interfering with settled expectations."

On the other hand, some of the language contained in *Gray* can be read to eschew consideration of reliance or other equitable factors. The Court stated at one point that the burden of justification for retroactive legislation could be "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." 467 U.S. at 730. Needless to say, however, a legislature may have a "rational" purpose for enacting a retroactive law notwithstanding the existence of demonstrable reliance interests in existing law.

This vagueness and confusion has left the lower courts without meaningful guidance. At least one state supreme court, for example, noting the tension between *Gray* and *Turner Elkhorn*, has adopted an explicit balancing test, explaining that "[a]gainst the unfairness of retroactivity in this case, we must balance the public interest it serves." *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 871 (R.I. 1987). As a result, while the Rhode Island Supreme Court posited that the legislation at issue in *Lawrence* had a rational cost-spreading purpose "similar to that [of the law at issue] in *Turner Elkhorn*," the court nevertheless invalidated the statute on due process grounds because the reliance of affected parties "on the preexisting law * * * outweigh[ed] the public interest served by the retroactive application of the [new law]." *Ibid.* Other courts, by contrast, have upheld retroactive legislation against due process attack without inquiring into reliance interests. See, *e.g.*, *United States* v. *Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988).

Uncertainty about the proper approach in this area has led some courts to substitute labels for analysis—a development that, not surprisingly, has led to conflicting outcomes in essentially identical cases. Thus, the Michigan Supreme Court reasoned that the 1987 amendment satisfied due process because "the defendants have no vested rights in the finality of the coordinated benefits paid." App., *infra*, 13a. As a leading commentator has observed, however, "it has long been recognized that the term 'vested right' is conclusory—a right is vested when it has been so far perfected that it cannot be taken away by statute." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960).

Indeed, in a case strikingly similar to this one, another state supreme court struck down a retroactive increase in workers' compensation benefits, finding that the existing benefit levels *were* "vested." *State ex rel. Briggs & Stratton Corp.* v. *Noll*, 302 N.W.2d 487, 490-492 (Wis. 1981). Such confusion about a recurring issue of considerable practical importance warrants this Court's consideration.

B. There Is A Temporal Point Beyond Which Retroactive Legislation Violates Due Process.

This Court recently recognized in *McKesson* that there are temporal limits to the permissibility of retroactive legislation:

> We previously have held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, *though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid."*

110 S. Ct. at 2252 n.23 (emphasis added) (quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938)). This limitation is directly relevant here. As the Michigan Supreme Court remarked, "[t]he payments at issue here are 'purely retroactive' in that they apply to payments for past injuries *and* they apply to payments that were already paid for past compensable periods." App., *infra*, 11a. In such circumstances, this Court has approved only legislation that reaches back to " 'recent transactions.' " *Welch*, 305 U.S. at 150 (citation omitted). Thus, in *Welch*, the Court affirmed the constitutionality of a retroactive tax increase by emphasizing that the state legislature had enacted the challenged law at "the first opportunity after the tax year in which the income was received." *Id.* at 151. See also *Gray*, 467 U.S. at 731 (stressing the "short and limited period" of retroactivity).

Against this background, a number of state supreme courts "have held unconstitutional any tax statute which attempts to be applied retroactively beyond the year of the legislative session immediately preceding the year of the statute's enactment." *Temple Univ.* v. *United States*, 769 F.2d 126, 134 (3d Cir. 1985). See *Commonwealth* v. *Budd Co.*, 108 A.2d 563, 568-569 (Pa. 1954); *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980). On the other hand, "no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity." *Temple Univ.*, 769 F.2d at 135. The court below—which approved legislation altering *five years'* worth of past payments—plainly aligned itself with the latter decisions. Again, the question whether there are temporal limits on retroactive legislation is a recurring issue of substantial practical importance.

The Michigan Supreme Court's endorsement of open-ended retroactive liability also points up a final area of uncertainty—the validity of so-called "curative legislation." The Michigan legislature announced that the 1987 amendment was aimed at overruling an erroneous judicial decision and therefore was "curative" (1987 PA 28, section 354, subsection 17); the court below stated that its holding of constitutionality rested, in part, on the determination that "the Legislature was modifying the coordination of benefits provision to cure a perceived defect resulting from the interpretation of the prior law in *Chambers*." App., *infra*, 12a. But as Justice White (joined by Justice Blackmun) explained nearly a decade ago, this Court's decisions "appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting from dismissal of appeal). Justice White added that "the lower courts are in conflict, and

the Court's prior cases fail to furnish adequate guidance." *Id.* at 1133-1134. As the decision below makes clear, that confusion has not abated in the intervening years. See *New England Baptist Hosp.* v. *United States*, 807 F.2d 280, 284 (1st Cir. 1986). Because the Michigan Supreme Court's contrasting decisions in *Chambers* and in this case demonstrate that the 1987 amendment changed "legislative policy" on a sweeping retroactive basis, this is an appropriate case in which to resolve the scope of the "curative legislation" doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

JACK F. WHEATLEY
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

MARCH 1991

APPENDICES

APPENDIX A

Evert ROMEIN, Plaintiff-Appellee,
and
Attorney General Frank J. Kelley, Intervenor-Appellee,
v.
GENERAL MOTORS CORPORATION, Defendant-Appellant.

Arthuro GONZALEZ, Plaintiff-Appellee,
and
Attorney General Frank J. Kelley, Intervenor-Appellee,
v.
FORD MOTOR COMPANY, Defendant-Appellant.

Docket Nos. 83830, 83831.
Calendar No. 7.

Argued Oct. 5, 1989.
Decided Sept. 28, 1990.

BEFORE THE ENTIRE BENCH
CAVANAGH, Justice.

We granted leave in these consolidated cases to decide the constitutionality of 1987 P.A. 28, § 354(17)-(20), M.C.L. § 418.354(17)-(20); M.S.A. § 17.237(354)(17)-(20). This statute prohibits the coordination of workers' compensation benefits for employees who were injured before the effective date of 1981 P.A. 203. It also requires the repayment plus interest of all benefits withheld as a result of coordinating benefits between 1982 and 1987 from disabled employees whose injury dates were before 1982. We hold that the amendments of the Workers' Disability Compensation Act contained in 1987 P.A. 28, § 354(17)-(20) are constitutional exercises of legislative power retroactively modifying benefit levels for a legitimate purpose furthered by rational means. We also hold that the statute does not abrogate any vested rights of the employers. The statute may validly be applied to all compensation liabilities within its terms except those which have been reduced to final judgment before its enactment.

FACTS AND PROCEDURAL HISTORY

The plaintiffs were injured before 1981. In 1981, the Legislature enacted 1981 P.A. 203 which included the coordination of benefits provision of § 354, M.C.L. § 418.354; M.S.A. § 17.237(354). This section allowed coordination of workers' compensation benefits with employer-funded pension plan payments. This statute was part of a legislative reform package involving a series of related amendments of the workers' compensation statute. The coordination provisions were an essential component of a compromise plan that restructured benefits payable to disabled workers. The resources saved as a result of this coordination were reallocated by the statute to increase benefit levels generally, from two-thirds of the average weekly wage to eighty percent of after-tax wages, effective for injuries occurring after January 1, 1982.

The plaintiffs were subjected to these coordination provisions even though the statute was silent regarding its application to claims resulting from injuries occurring before its 1982 effective date. On September 28, 1983, General Motors Corporation informed plaintiff Romein that he had been overpaid $75.03 per week from January 1, 1982, because of the corporation's failure to coordinate benefits under 1981 P.A. 203, § 354, as of its effective date. Thus, the corporation began to deduct the amount of this "overpayment" of $3,913.57 from compensation benefits as they became due and payable. The corporation also began coordinating future benefit payments by deducting pension and social security benefits from the workers' compensation payments due, resulting in a thirty-five percent reduction of benefits actually paid. This resulted in a reduction of $132 a week. His total benefits were reduced from $19,377.80 to $12,513.80 per year. Plaintiff Gonzalez experienced an even more dramatic reduction in his workers' compensation benefits. The Ford

Motor Company informed Gonzalez that it would begin coordination of his benefits in accordance with § 354 resulting in the withholding of his *entire* $176 weekly payment beginning March 31, 1982.

Between January 1, 1982, and October 7, 1985, the legality of coordination of benefits for injuries which occurred before the effective date of 1981 P.A. 203, § 354, was in doubt. The Legislature expressed its view that the initial, lower court decisions[1] permitting application of § 354 coordination rights only to claims arising from injuries occurring after the effective date of § 354 were correct.[2]

The defendants' efforts to coordinate plaintiffs' benefits under § 354 received judicial acceptance in 1985 when this Court reversed the lower court in *Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985). The Court applied principles of statutory interpretation to hold that § 354 permitted coordination of benefits regardless of the date of injury since the Legislature did not state an intent to apply the provision only to benefits paid to employees whose injuries occurred after its effective date.

Thereafter, the Legislature enacted 1987 P.A. 28 which clearly indicated that the coordination of benefits provision of 1981 P.A. 203 was not intended to reduce benefits for injuries which occurred before the effective date of the 1981 statute. This statute retroactively amended § 354

---

[1] See *Chambers v. General Motors Corp.*, 1982 WCABO 751, and *Franks v. White Pine Copper Div.*, 122 Mich.App. 177, 332 N.W.2d 447 (1982).

[2] The House and Senate both adopted legislative resolution in early 1982, purporting to interpret § 354 to prevent the coordination of benefits of persons injured before the effective date of § 354. These legislative resolutions, however, are not binding on this Court. *Chambers v. General Motors*, 422 Mich. 636, 659, 375 N.W. 2d 715 (1985).

and prevented any coordination of benefits for claims arising from injuries which occurred before March 31, 1982.

The first provision of 1987 P.A. 28 states that it is the Legislature's intent to prohibit the coordination of benefits for pre-March 31, 1982, injuries.[3] Another provision of the act requires that any setoffs which have been made by employers between March 31, 1982, and May 14, 1987, be refunded to employees, with interest. Thus, any benefits that were reduced under the coordination provisions of § 354, are deemed by statute to have been "underpayments" of workers' compensation benefits and must be refunded within sixty days with interest.[4] In addition, if the employee had repaid money to the employer for benefits received that the employer alleged should have been coordinated, 1987 P.A. 28 requires the employer to reimburse the employee, with interest, within sixty days.[5]

---

[3] Subsection 17 provides: "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985), is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to § 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

[4] Subsection 19 provides: "Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to § 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier."

[5] Subsection 20 provides: "Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or

(Footnote continued on following page)

The issue before the Court is whether the Legislature has violated the defendants' constitutional rights under the Due Process or Contract Clauses of the state and federal constitutions by retroactively altering the level of benefits due and payable prior to the amendment. We must also decide whether this retroactive alteration of benefits violates the Separation of Powers and One Court of Justice Clauses of the Michigan Constitution.

I

The defendants contend that 1987 P.A. 28, § 354(17)-(20) violates the Due Process Clauses of the United States and Michigan Constitutions by retroactively imposing liability for additional workers' compensation benefits for past compensable periods. They contend that they relied on the coordination provisions of § 354 during the period between its effective date of March 31, 1982, and the amendment date of May 14, 1987, and that this reliance gives them a vested right to have their liability for those periods determined by the law then in effect.

The defendants argue that 1987 P.A. 28 is "purely retroactive" and unconstitutionally impairs rights under executed contracts of employment.

The defendants urge that this statute is "purely retroactive" because it not only applies to injuries arising before the effective date of the act, but also modifies the employer's liability for a preenactment compensable period.

---

[5] *continued*
carrier because the employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982, shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier."

Thus, this statute is different from the one upheld in *Chambers*.

We hold that the challenged statute satisfies the rational relationship test and does not abrogate any vested rights of the employers. The statute, therefore, does not violate the Due Process Clauses.

A

A rational basis standard of review governs this Court's scrutiny of the legitimacy of social and economic legislation. "It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a Due Process violation to establish that the Legislature has acted in an arbitrary and irrational way. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 [83 S.Ct. 1028, 10 L.Ed.2d 93] (1963); *Williamson v. Lee Optical [Co.,]* 348 U.S. 483, 487-488 [75 S.Ct. 461, 464, 99 L.Ed. 563] (1955)." *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601 (1984).

The rational basis test has been applied to the retroactive portions as well as to prospective portions of statutes modifying workers' compensation benefit levels. *Pension Benefit Guaranty Corp., supra.*

To apply a stricter standard of review to a workers' compensation statute simply because it operates *retroactively* would put the judiciary in the business of "allocat[ing] the interlocking economic rights and duties of employers and employees upon workmen's compensation principles" although this is a task within the province of the Legislature. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976),

citing *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917).

B

A workers' compensation statute will not be deemed unconstitutional simply because it imposes "a new duty or liability based on past acts," *Usery, supra* 428 U.S. at 16, 96 S.Ct. at 2893. The *Usery* decision upheld the constitutionality of title IV of the Federal Coal Mine Health and Safety Act of 1969[6] against a Due Process Clause challenge by applying only minimal judicial scrutiny to its retroactive provisions. The statute retroactively imposed liability on employers for injuries which occurred years before its enactment. The law was retroactive in two respects. First, it altered the legal status of completed transactions by requiring the compensation of employees who left the industry before the effective date of the act. Second, it imposed liability on coal mine owners for injuries suffered before the date of the new statute.

The Court in *Usery, supra* at 16-17, 96 S.Ct. at 2893, cautioned that: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." The justification for retrospective legislation must take into account the possibilities that the parties acted in reliance on current law and that they may have altered their conduct to reduce liability if they had anticipated the imposition of later liability.[7] The coal mine

[6] See 30 U.S.C. §§ 931-945.

[7] The Court has examined an argument based on the likelihood of altering conduct to avoid future liability in *Welch v. Henry*, 305 U.S.

(Footnote continued on following page)

operators could not have altered their conduct to avoid retroactive liabilities arising from injuries occurring before 1950 because at that time there was no understanding of the causal relation between the exposure to coal dust and black lung disease. Thus, the injuries arising before the enactment of the statute could not have been foreseen or avoided.[8]

It is similarly unlikely that the defendants in this case would have altered their course of conduct and paid full benefits merely to avoid the potential liability from a later change in the law. This is especially true since they would have been unlikely to recoup these amounts from the employees if the coordination provisions were later upheld for pre-1982 injuries.[9] The employers acted in their own best economic interests at the time.

As in *Usery*, where the employer was required to pay benefits to former employees, the form of retroactive application at work here imposes liability for past, completed acts since the payments have already been made. These payments created an expectation in the employers that the payment periods were completed transactions. The employers in *Usery* also argued that the statute was pure-

---

[7] *continued*
134, 59 S.Ct. 121, 83 L.Ed. 87 (1938). The Court upheld against due process attack a state statute enacted in 1935 which taxed 1933 dividend income previously exempted by the 1933 taxing statute. The Court held that the stockholder would have continued to receive corporate dividends even if he had known that the dividends would later be taxed.

[8] *Usery*, *supra* 428 U.S. at 40, n. 4, 96 S.Ct. at 2904, n. 4 (Powell, J., concurring).

[9] As Justice Boyle stated in *Chambers*, *supra* 422 Mich. at 662, 375 N.W.2d 715: "[O]verpayment by an employer while waiting for the board to approve a setoff may be difficult or impossible to recover."

ly retroactive in that it required payment to miners who left employment in the industry before the effective date of the act, i.e., past, completed transactions.

Admittedly, the employers in this case held an expectation that the payments were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not. The retroactive aspects of legislation must meet the test of due process, "[b]ut that burden is met by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.*, *supra* 467 U.S. at 730, 104 S.Ct. at 2718. The Court in *Usery* held that the retroactive portion of the statute was justified "as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Usery*, *supra* 428 U.S. at 18, 96 S.Ct. at 2893.

The retroactive portions of the statute challenged here are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed. These amendments served a rational legislative purpose to alleviate this hardship.

The United States Supreme Court has upheld retroactive liability even where the employers acted in reliance on existing law. In *Pension Benefit Guaranty Corp.*, *supra* 467 U.S. at 729, 104 S.Ct. at 2717, the Court upheld the retroactive application of the Multiemployer Pension Plan

Amendments Act of 1980.[10] The statute modified the terms of a governmentally provided program of insurance designed to insure that the termination of a pension plan would not result in insufficient funds to pay employees their anticipated benefits. Employers paid premiums for the benefit of this government subsidized insurance program. The act imposed a new obligation on employers who terminated their plans to pay a proportionate share of the plan's "unfunded vested benefits." This new withdrawal liability was made retroactive for five months preceding the enactment of the amendments.[11]

The United States Court of Appeals for the Ninth Circuit found that the retroactive provisions of the act violated due process rights[12] because the employers had legitimately relied on existing law upon withdrawing from pension plans, but the United States Supreme Court reversed. The Court concluded that Congress could impose the act retroactively because the retroactive portion was a rational means to further a legitimate end, namely, "to prevent employers from avoiding the adverse consequences of [the newly enacted] withdrawal liability. . . ." *Id.* at 723, 104 S.Ct. at 2715.

The defendants seek to distinguish *Usery* and *Pension Benefit Guaranty Corp.* by arguing that the retroactive provisions of 1987 P.A. 28 are materially different from the workers' compensation and pension liabilities imposed

[10] 29 U.S.C. §§ 1381-1461.

[11] The retroactive provisions of the act resulted in the appellee in *Gray, supra,* having to pay a withdrawal liability of $201,359 that could neither have been foreseen nor avoided. *Id.* 467 U.S. at 725, 104 S.Ct. at 2715. Prior to enactment, this employer would have been liable upon termination of the plan to pay only funded pension rights that had vested.

[12] See *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (C.A.9, 1983).

by the statutes addressed in those two cases. The defendants argue that the statute in *Usery* only prospectively mandated the payment of new compensation obligations and so did not impose new liabilities for past compensable periods as does 1987 P.A. 28. But as to those miners in *Usery* who had left employment in the industry before the effective date of the act, the liability for past, completed transactions was altered. Additionally, the form of retroactivity does not alter the relevant test for assessing a due process violation. The payments at issue here are "purely retroactive" in that they apply to payments for past injury and they apply to payments that were already paid for past compensable periods. We cannot say, however, that the form chosen by the Legislature was arbitrary or unreasonable.

To determine if the retroactivity is arbitrary or unreasonable, the party's reliance on the preexisting state of the law should be considered.[13] Thus, we must address the extent of the defendants' justifiable reliance on the coordination provisions of the prior statute repealed by 1987 P.A. 28.

We are not persuaded that the defendants' reliance on the coordination provisions was reasonable.

The defendants cannot claim a reliance interest on rights created by the workers' compensation statute that are more deserving of constitutional protection than the reliance interest of the employers who incurred retroactive liabilities under the pension law upheld in *Pension Benefit Guaranty Corp., supra* 467 U.S. at 727, 104 S.Ct. at 2716. In both instances, the employers were on notice of the

[13] See *Brennan v. Kirby*, 529 A.2d 633, 640 (R.I., 1987), citing Hochman, *The Supreme Court and the constitutionality of retroactive legislation*, 73 Harv.L.R. 692, 727 (1960).

legislative debate regarding the proposed changes in the law. Reliance on an area of law that is in a state of flux is not reasonable reliance.

There are no vested rights in the amount of liability established at the time of an injury. The Legislature possesses the authority to enact workers' compensation laws that " 'increase the burden on the employer for disability or expenses occurring or continuing after the date of enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time.' " *Lahti v. Fosterling*, 357 Mich. 578, 592, 99 N.W.2d 490 (1959), citing *Hogan v. Lawlor & Cavanaugh Co.*, 286 A.D. 600, 146 N.Y.S.2d 119 (1955).[14]

This Court has held that a remedial statute which acts retroactively does not violate due process so long as it does not impair vested rights.[15] The statute challenged here does not violate this principle for several reasons. First, from the context in which the statute was passed, it is clear that the Legislature was modifying the coordination of benefits provision to cure a perceived defect resulting from the interpretation of the prior law in *Chambers*, *supra*. Therefore, the amendment is remedial.

---

[14] We do not address in this opinion the constitutionality of a retroactive statutory *reduction* in workers' compensation benefit levels.

[15] In *Karl v. Bryant Air Conditioning Co.*, 416 Mich. 558, 331 N.W.2d 456 (1982), the Court held that the newly enacted statute adopting comparative negligence could be applied to a products liability action even though the action was brought before the adoption of comparative negligence; the retroactivity did not violate due process because it did not take away any vested rights. See also *Hansen-Snyder Co. v. General Motors Corp.*, 371 Mich. 480, 124 N.W.2d 286 (1963).

Second, the defendants have no vested rights in the finality of the coordinated benefits paid. The retroactive liability imposed by 1987 P.A. 28 does not abrogate a vested or contractual right of the employers since workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature. See *Lahti*, *supra* 357 Mich. at 589, 99 N.W.2d 490. The United States Supreme Court has held that an employer's interest in the rate of compensation is not a right that is absolutely vested for purposes of the Due Process Clause: "[Certain] vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life."[16]

Finally, the 1987 amendment only modifies the source of funds from which an employer may satisfy a workers' compensation award. The entitlement to benefits was established before the enactment of the original coordination of benefits statute. The amendment does not create a new entitlement conferring a disability status not provided under prior law. In *White v. General Motors Corp.*, 431 Mich. 387, 395-396, n. 7, 429 N.W.2d 576 (1988), this Court recognized that the retroactive increase of the amount of benefits owing to a disabled employee differs qualitatively from a statute altering the terms of a claimant's eligibility for benefits. Thus, the defendant's assertion that the *amount* of benefits specified by statute is a vested right and cannot be retroactively modified is unsupported by case law.

We hold, therefore, that 1987 P.A. 28 is constitutional even though it applies to benefits due and payable for

---

[16] *United States v. Locke*, 471 U.S. 84, 105, 105 S.Ct. 1785, 1798, 85 L.Ed.2d 64 (1985), citing, *inter alia*, *Usery*, *supra*.

a period before the effective date of the statute. We hold further that only judgments entered under former law are immune from this legislative modification. This limitation protects the vested rights that form in reliance on an award at the moment it is reduced to a final judgment.

II

Having found no violation of the Due Process Clauses, we must now decide if 1987 P.A. 28 violates the Contract Clause, U.S. Const., art. I, § 10. The defendants contend that the retroactive provisions violate the Contract Clause because they revive liabilities of employers that were fully discharged by completed transactions in reliance on state law. We hold that the contention lacks merit primarily because the expectation at issue here is not protected by the Contract Clause.

Further, even if the benefit levels were construed as a contractual right, the law serves a significant and legitimate public purpose and it employs reasonable means sufficient to survive a Contract Clause challenge.

A

The defendants cannot rely on the level of benefits existing at the time of an injury as a legitimate contractual expectation protected by the Contract Clause. *Lahti, supra* 357 Mich. at 590-592, 99 N.W.2d 490.

Additionally, in *Chambers*, this Court reiterated the established principle that benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause. *Chambers, supra* 422 Mich. at 654, 375 N.W.2d 715, citing *Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978), and *Lahti, supra* 357 Mich. at 591-592, 99 N.W.2d 490.

B

Even though we hold that the Contract Clause does not apply to the benefits at issue here, the retroactive provisions would survive a Contract Clause challenge. While the Contract Clause prohibits any state law from impairing the obligations of contract, this prohibition must be "accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983). The prohibition, therefore, is not absolute. To test for the valid accommodation of the Contract Clause and the state's police power, the United States Supreme Court has established a three-pronged test. The first prong is to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978).

The impairment in this case cannot be deemed a substantial one. The workers' compensation statute substitutes a remedial scheme of compensation for injuries otherwise subject to recovery in tort actions for the negligent acts of employers in the workplace. The employers benefit from this scheme by obtaining a definite limit on their liability for workplace injuries. Since the impairment complained of in this case does not alter this basic benefit to the employer, it cannot be said to be substantial.

One factor in determining the extent of the impairment is the degree of regulation in the industry the complaining party has entered.[17] The party to a contract who has

[17] *Energy Reserves Group, Inc., supra*, citing *Spannaus, supra* 438 U.S. at 242, n. 13, 98 S.Ct. at 2721, n. 13, citing *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792, 794, 84

(Footnote continued on following page)

entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation. *Energy Reserves Group Inc., supra* 459 U.S. at 411, 103 S.Ct. at 704, citing *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). The workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation. In this scheme the parties occupy a status that subjects them to certain retroactively imposed rights and liabilities. *Lahti*. The defendants knew that their rights were subject to alteration. In addition, the legislative resolution in early 1982 purporting to interpret § 354 put the defendants on notice that the Legislature might seek to prevent the coordination of benefits for pre-1982 injuries if efforts to achieve this result failed in the courts. Since the employer was aware of the likely alteration of the coordination of benefits provision, the impairment cannot be deemed substantial.

To the extent, if any, that contractual interests are impaired, the second prong of the Contract Clause test requires that there be a legitimate public purpose for the regulation. This requirement guarantees that rather than merely providing a benefit to special interests, the state is validly exercising its police power. There is a significant state interest in protecting the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim.

---

[17] *continued*
L.Ed. 1061 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation on the same topic").

It is significant that in the 1981 amendment, the resources saved as a result of coordination of benefits were reallocated to increase benefit levels generally. These increased levels, however, were only for injuries after January 1, 1982. The Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982. There was a legitimate state interest, therefore, in correcting this perceived inequity.

The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen here are reasonable in the light of deference given to legislative action. "As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). The means are also reasonable since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute. The judicial interpretation that allowed for the setoff was deemed to be incorrect and the setoff must be returned, not an unreasonable solution.

We find that 1987 P.A. 28 serves a legitimate state interest in protecting the benefits of disabled employees through reasonable means sufficient to survive a Contract Clause challenge.

III

Turning to the Separation of Powers and One Court of Justice argument, we do not read the provisions of 1987

P.A. 28, § 354(17)-(20), as violating either art. 3, § 2 or art. 6, § 1 of the Michigan Constitution. The operative provisions of the statute do not encroach upon the sphere of the judiciary. Rather, they merely repeal the act that *Chambers* construed. That prior statute is superseded by 1987 P.A. 28 and the amendatory act expressly indicates that it is to be applied retroactively. This enactment is a valid exercise of the Legislature's authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and so long as the retroactive provisions of the statute do not impair final judgments.

Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments.[18] In *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 61 (C.A. 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing *the effects of a prior judicial decision* is not an exercise of judicial power:

"When the Fair Labor Standards Act was interpreted by the Supreme Court as requiring computation in the work week of time consumed in walking to work and other preliminary activities, this was just as though the original act contained express provision to that effect; and, when Congress passed the sections of the statute here under consideration, the effect was to repeal the original

[18] See, e.g., *Long Island Oil Products Co., Inc. v. Local 553 Pension Fund*, 775 F.2d 24, 30 (C.A.2, 1985).

statute to the extent of that coverage and deny to the federal courts jurisdiction to entertain a suit based thereon. This does not in any manner affect adjudications already made, nor does it attempt to direct the courts in the exercise of judicial power. All that it does is to define rights, i.e., to amend or limit the effect of a prior statute so as to take away a cause of action given by it."[19]

Similarly, in *Long v. United States Internal Revenue Service*, 742 F.2d 1173 (C.A. 9, 1984), subsequent proceedings vacated on other grounds 487 U.S. 1201, 108 S.Ct. 2839, 101 L.Ed.2d 878 (1988), the court upheld a statute that abolished the plaintiff's right to obtain disclosure of certain IRS data, although such disclosure rights had been created by a previous federal appellate decision interpreting a statutory exemption to the Freedom of Information Act. In upholding the Congressional repeal of this exemption against due process challenge, the Court articulated a principle that is useful in resolving the separation of power claim presented here: "Courts have consistently upheld the retroactive application of 'curative' legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be." *Id.* at 1183.

Indeed, if the defendants' separation of powers claim had merit as applied to the curative statute challenged here, the power of the Legislature to enact curative and remedial legislation would be severely curtailed, even where the statute does not violate constitutional due process

[19] Accord *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261-262 (C.A.2, 1948) ("[n]or is the Portal-to-Portal Act . . . an encroachment upon the separate powers of the judiciary").

limits.[20] This would represent a judicial usurpation of what is properly a legislative function.[21]

Finally, we conclude that § 354, as originally enacted in 1982, gave employers the right to coordinate benefits when an employee received a duplicate recovery through the receipt of other employer-funded benefits. Thus, employers may have properly exercised this right by withholding compensation benefits due and payable between the date of decision of *Chambers* in 1985 and the repeal of these provisions in 1987. An employer's act of withholding benefits, however, does not have the status of a final judgment.[22]

---

[20] We are, however, troubled by the language of subsection 17 of 1987 P.A. 28. This provision contends that this Court's holding in *Franks*, n. 3 *supra*, was erroneous. Even though the Legislature has authority to remedy the *effects* of this Court's decisions, and may do so by repealing statutes which those decisions interpret, the Legislature lacks the power to act as a supreme judicial body. But we need not address the defendants' separation of powers claim with respect to this particular provision. Even if we held that subsection 17 violated the Separation of Powers Clause of the Michigan Constitution, this holding would not affect the validity of subsections (18)-(20). These separate amendatory provisions express a legislative intent to retroactively prohibit the coordination of benefits authorized by the prior statute. These provisions wholly replace the former law. The legal effect of such a repealing statute that wholly supplants a former statute was addressed by this Court in *Lahti*, *supra* 357 Mich. at 588, 99 N.W.2d 490. *Lahti* held:

"Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there." *Id.*

[21] See, generally, Hochman, n. 13 *supra* at 704.

[22] We do not address the question of how and to what extent the principles of finality are implicated.

CONCLUSION

The employers' right to coordinate benefits as provided by statute in 1982 was repealed by 1987 P.A. 28 through a constitutional exercise of legislative authority to regulate social and economic life. We hold that 1987 P.A. 28 does not violate the Due Process Clauses of the state and federal constitutions, the Contract Clause of the federal constitution, or the Separation of Powers Clause of the Michigan Constitution, so long as it is not applied to impair coordination rights that were reduced to final judgment before its effective date.

Accordingly, we affirm the decision of the Court of Appeals.

LEVIN, BOYLE and ARCHER, JJ., concur.

BRICKLEY, Justice (concurring).

I. Introduction

Troubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment. For this reason, I reluctantly concur with the majority.

The threat that retroactive legislation poses to our system of republican government should, in my judgment, be taken very seriously. The alarm has been sounded by Professor Julian N. Eule, in his recent article *Temporal limits on the legislative mandate: Entrenchment and retroactivity*, 1987 Am. B. Found. Res. J. 379. I write separately primarily to amplify Professor Eule's message.

II. The Absence of Meaningful Constitutional Limitations on Retroactive Civil Legislation

A

Regarding the current state of the law, Professor Eule neatly sums up the sad state of affairs as follows:

> "Efforts to locate limits on retroactivity in the due process clauses of the fifth and fourteenth amendments, although once viewed as promising, seem to have fallen on hard times. The resurrection of the contract clause has not been paralleled under the due process provisions. The occasional noises emanating from the Court, designed to remind us that the route is not foreclosed, have a hollow ring to them. In *Usery v. Turner Elkhorn Mining Co.* [428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)], for example, Justice Marshall, writing for the Court, concluded his recitation of the minimal scrutiny appropriate in reviewing economic legislation under the due process clause with the statement: 'It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively.' In the context of the entire opinion, which nevertheless upheld the retrospective application of federal mine health legislation, this language cannot be fairly read as proposing or applying a more stringent level of scrutiny for retroactive legislation. Minimal scrutiny is still very much the order of the day. Only the focus is adjusted slightly. Hence it is not the legislative selection of the means but its decision to apply the means retrospectively that must bear a 'rational relationship' to whatever legitimate ends the Court conjures up. The slim possibility that a successful attack could ever be launched, given the size of this judicially constructed target, is rendered implausible by the strong presumption of constitutionality that economic and remedial social enactments are afforded, even when retroactive. In the determination of whether retrospective economic legislation violates due process, the burden of proving irrationality thus rests squarely on the party asserting the violation. There is not much for a legislator to worry about here." *Id.*, p. 429 (citations omitted).

B

In my opinion, *Turner Elkhorn* and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), make clear that the legislation here under attack need only survive minimal, rational-basis scrutiny.[1] In addition, there are numerous

[1] The Contract Clause, as the majority observes, does not help the appellants, and potentially promising arguments based on the Taking Clause of the federal constitution and Const. 1963, art. 4, § 27 are not before us.

cases from the federal courts of appeals supporting the majority's result. See, e.g., *Wiggins v. Comm'r of Internal Revenue*, 904 F.2d 311 (C.A. 5, 1990) (upholding the retroactive application to tax year 1983 of 1984 federal tax legislation, despite the appellant's reliance on the prior law); *Canisius College v. United States*, 799 F.2d 18 (C.A. 2, 1986), cert. den. 481 U.S. 1014, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987), *Temple Univ. v. United States*, 769 F.2d 126 (C.A. 3, 1985), cert. den. 476 U.S. 1182, 106 S.Ct. 2914, 91 L.Ed.2d 544 (1986), and *New England Baptist Hosp. v. United States*, 807 F.2d 280 (C.A. 1, 1986) (upholding, against a due process challenge, a retroactivity period of approximately four years); *Long Island Oil Products v. Local 553 Pension Fund*, 775 F.2d 24 (C.A. 2, 1985) (upholding a statute which reached back five years to undo a previously authorized six-month period of retroactivity); *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (C.A. 8, 1986), cert. den. 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987), *United States v. Monsanto Co.*, 858 F.2d 160 (C.A. 4, 1988), cert. den. 490 U.S. 1106, 109 S.Ct. 3156, 104 L. Ed.2d 1019 (1989), and *O'Neil v. Picillo*, 883 F.2d 176 (C.A. 1, 1989), cert. den. 493 U.S. ____, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990) (upholding retroactive application of a federal environmental statute creating liability for past, improper disposal of hazardous waste); *Counsel v. Dow*, 849 F.2d 731 (C.A. 2, 1988), cert. den. 488 U.S. 955, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988) (upholding legislation retroactively authorizing attorney fees); and cases upholding the constitutionality of the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.*, including *Battaglia v. General Motors Corp.*, 169 F.2d 254 (C.A. 2, 1948), cert. den. 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948), and *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (C.A. 4, 1948) (upholding extensive retroactive nullification of a Supreme

Court decision interpreting the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.).

III. Temporal Limits on the Legislative Mandate

While Professor Eule's insights cannot be faithfully reproduced in a short space, the following excerpts may suffice to convey the gist of his thesis.

> "The Framers were not blind to the citizenry's need for some security from the 'fluctuating policy' of successive legislatures. It was to fulfill this need, said Madison, that the contract and ex post facto clauses were written into the Constitution. Conflicting lessons can be drawn from the inclusion of these restraints. They may alternatively be viewed as limited sanctuaries from the otherwise unfettered authority of legislatures to undo the policy judgments of their predecessors or as compelling evidence of the disfavored status of retrospective lawmaking. It is the choice between these competing visions—rather than the debate over natural law—that ultimately divided Justices Iredell and Chase in *Calder v. Bull* [3 U.S. (3 Dall) 386; 1 L. Ed. 648 (1798)]. Both agreed that the ex post facto clause could not, consistent with the historical meaning of that phrase, be applied to the civil legislation before the Court. For Justice Iredell this ended the constitutional inquiry since he believed that the legislature's power necessarily included all that was not expressly denied to it. Furthermore, in Iredell's eyes, the power to alter preexisting legal understandings was essential, not merely tolerable. He argued that if legislators were denied the ability to subordinate private rights to public exigencies, 'the operations of Government would often be obstructed, and society itself would be endangered.' Iredell was not blind to the possibilities for abuse, but he contended that such risks had been undertaken willingly by the people when they delegated authority to their agents.

"Justice Chase viewed the people's grant as more restrained. Rejecting Iredell's assumption that power not denied was conferred, Chase maintained instead that power not conferred was denied. A determination of what authority the people had entrusted to their agents (through the federal or state constitution) could not be made without an understanding of the principles of a republican form of government. Legislation inconsistent with those principles should be viewed as beyond the scope of the grant. The inapplicability of the ex post facto clause did not foreclose the possibility that the power exercised by the Connecticut legislature was one that the people of Connecticut had not conferred. It is common for scholars to characterize Justice Chase's vision as limiting legislative power by reliance on immutable natural rights. This misses the point. Chase's thesis was not that government *could not* be given the authority to act retrospectively, but that the conferral of power to act at odds with republican principles should not be 'presumed.' For both Justices, therefore, the issue was one of agency: Does the scope of authority delegated by the people to their representatives comprehend the power to legislate retroactively where the exercise of such power is not expressly forbidden?

* * *

"The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication. A decision that bills defeated by prior legislatures can now be enacted and treated as if they had been enacted earlier arguably runs afoul of this same principle. The then-authorized representatives made a choice, and this decision demands recognition as the choice of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone. Just as the delegation of authority does not encompass incursions into the domain of legislatures yet to come, it does not contemplate contravening the sanctity of the past.

"While I contend that the prohibition against entrenchment and retroactivity are both products of the temporal boundaries the electorate affixes to its mandate, I do not pretend that these two borders are drawn to serve identical ends. I do believe they manifest a common interest in affording each generation of voters the opportunity to determine for itself, through its representatives, the rules that will govern its daily life. The two constraints, however, satisfy different—and at times conflicting—human needs. The postmandate restriction protects flexibility. It preserves the polity's right to change its mind. The premandate limitation, on the other hand, offers stability. It enables the polity to alter its direction, without unduly undermining the security we all find so necessary. This means that the choices of our representatives can be relied on for the temporal realm in which these agents legitimately exercised authority. No more is guaranteed, but no less is tolerable." Eule, *supra*, pp. 441-446 (emphasis in original).

The Legislature in this case did not merely change the future consequences of past acts, i.e., by changing the future benefit levels for persons injured prior to 1982—a practice which the appellants concede would be a constitutional way to amend our workers' compensation scheme; rather, the Legislature turns back the clock to redefine rights and liabilities enjoyed and owing in the past, notwithstanding the fact that those rights and liabilities had already been determined by an earlier and different body of agents of an earlier majority, determinations which the Legislature in 1983, 1984, 1985 and 1986 declined to change. The legislation in this case violates the temporal limits of the 1987 Legislature. Because the United States Supreme Court has given no indication that it approves of Professor Eule's approach, however, I must decline to dis-

sent on these grounds from the majority's finding that the 1987 amendments are constitutional.[2]

IV. Analysis of the Majority Opinion

For the most part, I concur with the analysis adopted in the majority opinion. I, too, am troubled by the Legislature's apparent attempt to interpret a prior statute adopted by a prior Legislature. This is doubly distressing in light of our intervening decision in *Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985). Because the Legislature may not interpret its own statute, let alone that of a prior Legislature, I agree with the majority that the 1987 legislation must be viewed as a retroactive amendment rather than as a "legislative interpretation" of an earlier statute. This is the effect of the 1987 legislation, and courts, which must presume statutes to be constitutional, are required to look beyond form to the substance of the challenged legislation.[3] As stated earlier, I find no principled basis for concluding that the 1987 amendments fail the rational basis tests articulated by the United States Supreme Court; since appellants have not offered a persuasive reason for giving a broader interpretation to the Due Process Clause of the state constitution, I agree that appellants' due process claims fail.[4]

---

[2] While the appellants refer to Professor Eule's article, they do not mount a "temporal mandate" attack on the 1987 amendments rooted in the state constitution or in the Guaranty Clause of the federal constitution.

[3] Thus, if the provision declaring our decision in *Franks* erroneous is struck from the 1987 amendments, we must nevertheless determine whether the remainder may stand on its own terms. Since the remaining provisions clearly operate retroactively, the relevant inquiry is whether they offend due process.

[4] In addition, no reasons are offered why the traditional rational basis inquiry should not apply to the due process claim.

I also agree with the majority that the appellants cannot show any sort of reliance on the prior state of the law. I would not, however, go so far as to hold the possibility of reasonable reliance foreclosed by the mere fact that the Legislature debated changing the law before doing so.

I do not agree with the majority's cursory discussion and conclusion, Op. p. 564, that the amendments in this case are "remedial." That term, in my view, should be used with caution, lest every amendment be deemed remedial. The majority has not persuaded me that the amendments at issue in this case should be so categorized.

Finally, I would not analyze appellants' Contract Clause argument as if that clause applied in this case. I therefore concur in the analysis and holding of § II(A), but not in those of § II(B).

In all other respects, I concur in the result and analysis of the majority opinion.

RILEY, Chief Justice (dissenting).

I respectfully dissent from the majority. In my opinion, the Legislature has invaded the constitutional authority granted to the judicial branch and usurped the judicial function of determining the proper construction of a statute. It is within the power of this Court, not the Legislature, to interpret the legislative intent of 1981 P.A. 203. Therefore, I would conclude that 1987 P.A. 28, § 354(17)-(20), violates art. 3, § 2 and art. 6, § 1 of the Michigan Constitution of 1963. Accordingly, I would hold that 1987 P.A. 28, § 354(17)-(20) is to be applied prospectively from its effective date, May 14, 1987.

I. HISTORICAL BACKGROUND

In 1987 P.A. 28, § 354(17), the Legislature stated:

> "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 [375 N.W.2d 715] (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

In *Presque Isle Twp. School Dist. v. Presque Isle Co. Bd. of Ed.*, 364 Mich. 605, 612, 111 N.W.2d 853 (1961), this Court held:

> " 'It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. . . . Its members have no more right to construe one of its enactments retroactively than has any private individual.' "[1]

A review of the historical background that encompassed the enactment of 1981 P.A. 203 and 1987 P.A. 28 serves to illustrate the reasoning behind this prohibition.

As outlined below, the interpretation of § 354 imputed to the 1981 Legislature by the 1987 Legislature was erroneous. The 1981 Legislature was fully cognizant of the consequences of coordinating workers' compensation benefits, yet it enacted 1981 P.A. 203 in an attempt to stimulate a poor state economy by lowering the cost of doing business in Michigan.

A. 1981 P.A. 203

1981 P.A. 203 was part of a comprehensive reform of the Workers' Disability Compensation Act that was begun one year earlier.[2] The purpose of the reform, and specifically 1981 P.A. 203, was to reduce the cost to the business community of workers' compensation liability and to eliminate perceived abuses of the system. 1981 P.A. 203 was passed in December, 1981. During the period prior to the enactment of this legislation, Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent,[3] and the 1981

---

[1] Quoting *Northern Trust Co. v. Snyder*, 113 Wis. 516, 530, 89 N.W. 460, 90 Am.St.Rep. 867 (1902).

[2] *Franks v. White Pine Copper Div.*, 422 Mich. 636, 649-650, 375 N.W.2d 715 (1985).

[3] MESC Report No. 3221 (1981). Provided by the Business Research Office, Michigan Department of Commerce.

inflation rate for the City of Detroit in 1981 was 9.3 percent.[4] It was against this economic backdrop that the Legislature passed 1981 P.A. 203.[5]

As noted in *Chambers v. General Motors Corp.*, companion case of *Franks, supra* 422 Mich. at 655, 375 N.W. 2d 715, Governor William Milliken discussed his proposals to solve what he deemed the " 'biggest single liability to Michigan's job climate today [November 18, 1981]' ":[6]

> " 'To start with, we must keep in mind that the purpose of workers' compensation, after all, is to restore wage-earning capacity lost in on-the-job accidents. *Workers' compensation was never intended to be more lucrative than gainful employment* or to be a retirement bonus.
>
> " 'I have proposed that we coordinate benefits from different employer-paid sources so that workers receive the maximum benefits to which they are entitled, but no more. *It is only simple justice that an employer not be assessed costs for several different funds which result in reimbursing the injured worker for more than the lost wage-earning capacity.*' "[7] (Emphasis added.)

The Governor's concerns were echoed in the Senate Analysis Section, SB 573: First Analysis, p. 6 (January 7, 1982):

---

[4] Consumer Price Index for the City of Detroit. Provided by the Business Research Office, Michigan Department of Commerce. Note, the Bureau of Labor Statistics computes the inflation rate only for major metropolitan cities. Detroit is the only city in Michigan for which the inflation rate is computed.

[5] The Senate passed the act by a vote of 26 yeas to 12 nays, SB 595, 1981 Senate Journal 2607. The House passed the act by a vote of 62 yeas to 43 nays, 1981 House Journal 2854.

[6] Remarks by Governor William G. Milliken to the Ann Arbor Chamber of Commerce on November 18, 1981.

[7] *Id.*

> "By coordinating workers' compensation benefits with Social Security and other benefits, *Senate Bill 595 [1981 PA 203] would provide a major savings to employers in the cost of workers' compensation while maintaining adequate benefit levels for disabled workers.* (Emphasis added.)
>
> * * * * * *
>
> "Since 1912, other public and private wage replacement insurance programs have appeared with the result that many employees now receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job, *while employers who must contribute to these programs find themselves paying more than once to replace the wages of a single employee.*" (Emphasis added.)

After SB 595 passed the House vote, five members of the House reserved the right to enter their protests against the passage of the bill. Rep. Cushingberry said:

> "This measure, while I'm sure will be reported as a major cost savings measure for business; it will prove to produce its benefits. The only thing this bill will do is to perhaps increase the burden on those less fortunate. . . . This outcome of our act tonight effectively cuts the benefits of even those who have a legitimate worker's disability." 1981 House Journal 2855.

Reps. Emerson and Vanek protested, "This provision that has been adopted will increase the likelihood that an injured employee could receive no worker's compensation benefit, hardly an incentive for employers of this state to maintain a safe workplace." *Id.* Rep. Kelsey stated:

> "Additionally, I supported the revisions of the system during the fall of 1980, which will take effect in January, 1982. To my dismay, however, the commitment to only do away with the abuses was not kept and it was decided by the proponents of revision to go all the way and not only to take care of the abuses

but, again, to abuse and deprive the legitimate victims of on-the-job injuries. It was proposed not only to reduce the length of benefits but also the amount of benefits received by the workers. . . . I could not, in good conscience, support the so-called revision *which would only add to the current economic depression* and harm the citizens of the State of Michigan." *Id.* at 2856. (Emphasis added.)

Finally, Rep. Elliot added:

"This package tonight will relieve many employers of their responsibilities to pay any worker's compensation benefits, *not only to older workers* but also to younger workers whose families may be entitled to social security benefits." *Id.* (Emphasis added.)

The 1981 Legislature knew exactly the consequences of SB 595. The purpose of the bill was to effectuate a cost saving reform for business, and to eliminate duplicate recovery of benefits. While some legislators strongly opposed 1981 P.A. 203, the majority felt the need for economic reform outweighed the "burden"[8] that may be felt by an injured worker receiving benefits from more than one source. Four years later, this Court upheld the clear legislative intent behind 1981 P.A. 203 when we *unanimously* held "that this statute clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods subsequent to its effective date, regardless of when the injury occurred." *Chambers*, *supra* 422 Mich. at 651, 375 N.W.2d 715. However, the 1987 Legislature not only disregarded our *Chambers* decision as having been "erroneously rendered," it

[8] I quote the word "burden" because the effect of the coordination of benefits is that an injured employee will receive benefits in an amount equal to what he is entitled, but nothing extra by way of duplicate benefits.

also ignored the legislative history that served as the basis for the *Chambers* decision.

B. 1987 P.A. 28

1987 P.A. 28 claims that the legislative intent of § 354 of 1981 P.A. 203 was "not to coordinate payments under this section . . . for personal injuries occurring before March 31, 1982." However, a review of the voting members of the 1987 Legislature indicates that this claim is impossible to sustain.

The 1987 amendment of § 354 was enacted in May 1987. At this time, Michigan was enjoying a much improved economic climate.[9] The level of unemployment was 8.2 percent[10] (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent[11] (down from the 1981 level of 9.3 percent). With Michigan industry in a much improved condition, and with a new Governor, the 1987 Legislature revisited the work of the 1981 Legislature.

The 1987 Legislature was displeased with the decision of this Court in *Chambers*, so it sought to correct our "erroneous" decision by providing its own "interpretation" of the intent of the 1981 Legislature. However, as pointed out by the appellants, only a fraction of the senators and

[9] Perhaps the reforms of the Workers' Disability Compensation Act that were enacted in 1981 served their intended purpose of helping Michigan businesses return to economic health.

[10] MESC Report No. 3221 (1987). Provided by the Business Research Office, Michigan Department of Commerce.

[11] 1987 Consumer Price Index. Provided by the Business Research Office, Michigan Department of Commerce. Detroit is the only Michigan city for which the United States Bureau of Labor Statistics computes the inflation rate. See n. 4.

representatives who voted in favor of 1981 P.A. 203 were still around to "interpret" the 1981 legislative intent with 1987 P.A. 28. Specifically, only eleven of the twenty-six senators[12] who voted in favor of 1981 P.A. 203 were still around to vote in favor of 1987 P.A. 28.[13] Similarly, only twenty of the sixty-two representatives[14] who voted in favor of 1981 P.A. 203 were around to vote in favor of 1987 P.A. 28.[15] Therefore, even though *less than half of the senators and less than one-third of the representatives from the 1981 Legislature* who voted in favor of 1981 P.A. 203 also voted in favor of 1987 P.A. 28, the 1987 Legislature claims that its amendment was the original intent of the 1981 Legislature. This is a claim with which I can not agree.

Furthermore, the claim of the 1987 Legislature that it provided the original intent of the 1981 Legislature flies in the face of the fact that those members of the 1981 Legislature who opposed 1981 P.A. 203 failed in their attempt to limit its application. As pointed out in *Chambers*, *supra* 422 Mich. at 659, 375 N.W.2d 715, a legislative resolution[16] was passed after the enactment of § 354 which attempted to prevent the coordination of benefits of per-

---

[12] Senators Arthurhultz, DeGrow, DiNello, Faust, Fredricks, Gast, Geake, Irwin, Miller, Sederburg, and Welborn.

[13] The Senate vote in favor of 1987 P.A. 28 was 35 yeas, one nay, and two excused. 1987 Senate Journal 1232.

[14] Representatives Alley, Brotherton, Bryant, Dunaskiss, Dutko, Giese, Gilmer, Gnodtke, Griffin, Hillegonds, Johnson, Knight, Maynard, Ostling, Randall, Stacey, Stopczynski, Strand, Trim, and Van Singel. 1987 House Journal 1232.

[15] The House vote in favor of 1987 P.A. 28 was 95 yeas, zero nay. *Id.*

[16] Senate Concurrent Resolution No. 575 adopted by the Senate on April 1, 1982, 1982 Senate Journal 626, 706; adopted by the House on May 18, 1982, 1982 House Journal 1262.

sons injured prior to its effective date. This Court first noted that the resolution was an attempt by those who opposed 1981 P.A. 203 to subsequently limit its scope and then held:

> "Had the Legislature wanted to change § 354 to impose that limitation, it could have properly done so only by amendment. Although § 354 has been amended, such amendments have not limited its application with respect to date of injury. Finally, the respectful consideration to which legislative resolutions are entitled . . . is offset here by the fact that a bill introduced to achieve that result was defeated. [SB 834, introduced on May 20, 1982.]" *Id.*

In sum, the economic and political climate surrounding the enactment of 1987 P.A. 28 was vastly different from that in 1981. Only thirty-five percent of those members of the 1981 Legislature who voted in favor of 1981 P.A. 203 also voted in favor of the 1987 amendment. Also, the legislative history of 1981 P.A. 203 clearly contradicts the claim of the 1987 Legislature that 1987 P.A. 28 provided the original intent of the 1981 Legislature.

Through this scenario, the wisdom of the *Presque Isle Twp. School Dist.*, rule becomes evident—a legislative body is not permitted to declare what its intention was on a former occasion so as to affect past transactions. Therefore, I would conclude that the claim of the 1987 Legislature is nugatory.[17]

---

[17] At the very least, just as the 1987 Legislature felt that our decision in *Franks*, *supra*, was erroneous, it is equally plausible that the interpretation imputed to the 1981 Legislature by the 1987 Legislature was erroneous.

II. REMEDIAL LEGISLATION v. SUBSTANTIVE CHANGE

The 1987 Legislature described 1987 P.A. 28 as a "remedial and curative amendment," § 354(17). This is a description with which the Court of Appeals agreed.[18] I do not share the same opinion.

The function of curative legislation is to "repair the consequences of legal accident or mistake." 2 Sands, Sutherland Statutory Construction (4th ed), § 41.01, p. 338. A legal accident or mistake "can be the result of the failure of the lawmakers to make provision for unforeseen circumstances which should have been provided for or the failure of parties to conform to nonessential legal requirements or limitations." *Id.*

The case before us today is not one of "legal accident or mistake." Quite the opposite is true. 1981 P.A. 203 was enacted at the conclusion of a comprehensive reform of the Workers' Disability Compensation Act. The Legislature had made the determination that the system was subject to abuse by employees who were receiving benefits from multiple sources. In turn, this would result in the employee receiving total benefits that were in excess of his workplace compensation. In order to eliminate this possibility, and to reduce the cost of workers' compensation to businesses, the coordination of benefits provision was enacted.

There was no "failure . . . to make provisions for unforseen circumstances." The Legislature enacted a statute that gave employers the right to coordinate benefits beginning on March 31, 1982. On October 7, 1985, this Court

[18] *Romein v. General Motors Corp.*, 168 Mich.App. 444, 455, 425 N.W.2d 174 (1988).

unanimously interpreted the statute to mean that employers have the right to coordinate benefit payments regardless of the date of injury. Consequently, after having the matter resolved by the highest court in the state, General Motors and Ford had the unquestionable right to coordinate the benefits of all employees receiving workers' compensation benefits who came under the provisions of 1981 P.A. 203.

Yet, nearly two years after the *Chambers* decision, and more than five years after the enactment of 1981 P.A. 203, the 1987 Legislature declared that General Motors and Ford did not have the right to coordinate benefits. Furthermore, § 354(19) of 1987 P.A. 28, required any amount so coordinated (pursuant to the statutory right as interpreted in *Chambers*), to be reimbursed *with interest*.

For a number of years, General Motors and Ford were coordinating benefit payments pursuant to their statutory right. At the very least, the companies were acting within the spirit of the law. Yet, this right was retroactively revoked by "remedial" legislation. Also, the "curative" legislation imposed upon the companies the added obligation of interest. Finally, 1987 P.A. 28 was enacted to invalidate this Court's decision in *Chambers*, thus effecting a substantive change in the law. *Hurd v. Ford Motor Co.*, 423 Mich. 531, 534, 377 N.W.2d 300 (1985).

"[T]he word of the 'curing' legislature should not be conclusive in determining what the prior representatives meant. The question of original intent is ultimately one for the reviewing court." Eule, *Temporal limits on the legislative mandate: Entrenchment and retroactivity*, 1987 Am. B. Found. Res. J. 379, 448. This Court had interpreted the original intent of the 1981 Legislature. Yet, our interpretation was rejected by the 1987 Legislature. Therefore, I can not agree that the 1987 amendment was "remedial

and curative." Rather, I would hold that the 1987 amendment amounted to a substantive change in the law.[19]

III. CONSTITUTIONAL ANALYSIS

A

The majority holds, "[t]he operative provisions of the statute do not encroach upon the sphere of the judiciary. Rather, they merely repeal the act that *Chambers* construed." Op., p. 20. However, this argument fails when reviewed against well-settled Michigan case law and the rules of statutory construction.

In *Wade v. Farrell*, 270 Mich. 562, 567, 259 N.W. 326 (1935), this Court unanimously[20] held:

> " 'When a statute continues a former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and *only new provisions are new laws. Where an act is amended . . . the part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment* and the new portion as having become the law only at the time of the amendment.' 25 RCL p. 907." [21] (Emphasis added.)

[19] In fact, the language found in § 354(17) was added in an admitted attempt to "cure the [constitutional] defect." Statement of Sen. DeGrow after the Senate voted in favor of SB 67 (1987 P.A. 28), 1987 Senate Journal 1235-1236. See text, p. 15.

[20] The opinion was signed by the six justices who participated, Chief Justice Potter and Justices Fead, Wiest, Butzel, Bushnell, and Edward M. Sharpe. Justice Nelson Sharpe did not sit.

[21] See also *Perry v. Hogarth*, 261 Mich. 526, 530, 246 N.W. 214 (1933).

The rule quoted in *Wade*, mirrors the rule enunciated in 1A Sands, Sutherland Statutory Construction (4th ed), § 22.33, pp. 287-288:

> "Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or section is expressly declared to be repealed. . . . *The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted*, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the provisions of the original act which are reenacted are not affected by the amendment." (Emphasis added.)

Our decision in *Chambers* interpreted the coordination of benefits provisions as pertaining to all benefit payments due after March 31, 1982, regardless of the date of injury. The majority claims that the 1987 P.A. 28 "repeal[ed] the act that *Chambers* construed." However, 1987 P.A. 28 adopted verbatim the language of the first fifteen sections of the original act, M.C.L. § 418.354(1)-(15); M.S.A. § 17.237(354)(1)-(15), and it is within these first fifteen sections that the coordination of benefits provisions are found.

Applying both Michigan law and the rules of statutory construction to the instant matter leads to the conclusion that the coordination of benefits provisions that were interpreted by this Court in *Chambers* were not repealed. Rather, because they were reenacted by adopting the identical language from the original act, the coordination of benefits provisions are " 'considered as having continued in force as the law from the time of [their] original enactment [March 31, 1982].' " *Wade*, *supra* 270 Mich. at 567, 259 N.W. 326.

B

Thus, I am persuaded that the declaration made by the 1987 Legislature in 1987 P.A. 28, § 354(17) that it was providing the legislative intent of the 1981 Legislature is clearly not supported by the economic, political, and legislative history behind the enactment of each amendment at issue here, 1987 P.A. 28 and 1981 P.A. 203. Moreover, it violates Michigan case law, *Presque Isle Twp. School Dist.*, *supra*. The amendment enacted by the 1987 Legislature was not "remedial and curative." Rather, it was a substantive change in the law. Finally, 1987 P.A. 28 did not repeal the legislative provisions that we interpreted in *Chambers*.

Therefore, the remaining question is, "What is the net effect of 1987 P.A. 28, and is the amendment constitutional?"

In my opinion, the net effect of 1987 P.A. 28 was nothing more than an attempt to "overrule" the decision of this Court in *Chambers*, to render the *Chambers* opinion null and void, as if it was never released.[22] This Court cannot surrender to this invasion into the constitutionally granted authority of the judicial branch.

---

[22] After the 1987 Senate voted to pass SB 67 (1987 P.A. 28), Sen. Cherry, a member of the conference committee that prepared the bill, stated, "Additionally, I am pleased that the language in Section 354 will finally correct the gross injustice done by the Supreme Court's *Chambers* decision. It is a disgrace that has taken four years for the Legislature to act to rectify this situation which portrays a promise to many older workers." 1987 Senate Journal 1234-1235.

Query: Was the "gross injustice," as perceived by Sen. Cherry, a result of this Court's decision, or was it a result of the statutory language passed by the 1981 Legislature which this Court is duty bound to interpret?

It should come as no surprise to the Legislature that 1987 P.A. 28 was constitutionally defective. After SB 67 (1987 P.A. 28) was passed, Sen. DeGrow[23] commented:

> "Additionally, we've put in language that I think strengthens the argument that what we've done with the *Chambers* decision is constitutional. *We put in a preceding paragraph that tells what the intent of the Legislature was and will make stronger the argument that we haven't passed an unconstitutional act. I'm not sure it will cure the defect*, but I think we can feel a little better about ourselves in terms of voting for it; that it is not something that is unconstitutional." 1987 Senate Journal 1236. (Emphasis added.)

In his article, Professor Julian N. Eule notes, *supra* at 445:

> "The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication. A decision that bills defeated by prior legislatures can now be enacted and treated as if they *had* been enacted earlier arguably runs afoul of this same principle.[24] The then-authorized representatives made a choice, and this decision demands recognition as the choice of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone. Just as the delegation of authority does not encompass incursions into the domain of legislatures yet

---

[23] Sen. DeGrow was a senate conferee for the Conference Report regarding 1987 P.A. 28. 1987 Senate Journal 1232.

[24] Keep in mind that a bill, introduced in an attempt to limit the application of the coordination of benefits provisions, was defeated. SB 834, introduced on May 20, 1982. See text, *supra* at 7.

> to come, it does not contemplate contravening the sanctity of time past." (Emphasis supplied.)

In *Bankers Trust Co. v. Russell*, 263 Mich. 677, 684, 249 N.W. 27 (1933), this Court reiterated the rule that to declare what the law shall be is a legislative power, and to declare what the law is, or has been, is a judicial power. The Court went on to hold, "[the Legislature] may not by statute attempt to exercise judicial power by construing a statute for the court." *Id.*[25]

The members of the 1981 Legislature were the "then-authorized representatives" who made their decisions based on the demands of the time. In 1981, they declared what the law "shall be" with regard to the coordination of benefit payments. In 1985, this Court interpreted what the "meaning" of the law was. Subsequently, the 1987 Legislature attempted to exercise judicial power by "rewrit[ing] history" in order to retroactively construe the statute for this Court, the effect of which was to eradicate the 1981 legislation. I find this to be an unconstitutional encroachment upon the judiciary.

In speaking about the problem of retroactivity, Justice Holmes once remarked, "[p]erhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions." *Danforth v. Groton Water Co.*,

---

[25] Analogous to the current matter, in *Bankers Trust Co.*, the Legislature attempted to retroactively construe the term "trust mortgage" as used in 1929 CL 13498, 13499. The purpose behind the amendment was to assist owners of property and securities who had liens placed upon them as a result of the depression. Addressing the plight of the individuals adversely affected, the Court held, "Conflicting interests are involved in these cases, and *the court can but construe the statute in question as it reads, and not as equitable considerations might impel us to do.*" *Bankers Trust Co., supra* 263 Mich. at 684-685, 249 N.W. 27. (Emphasis added.)

178 Mass. 472, 476, 59 N.E. 1033, 86 Am.St.Rep. 495 (1901). Perhaps this is the case here. In any event, I believe that the circumstances surrounding the retroactive enactment of 1987 P.A. 28 evidence a particularly egregious intrusion upon the separation of powers and the "one court of justice" articles of the Michigan Constitution.[26]

IV. CONCLUSION

I am not yet prepared to accept the "slippery slope" argument that unless the Court acts now, the Legislature will usurp all of the constitutional authority granted to the judiciary. However, the Michigan Constitution of 1963 mandates the separation of powers between the three branches of government, art. 3, § 2, and declares that the judicial power of the state is vested in "one court of justice," art. 6, § 1.

Throughout history, courts of last resort have been called upon to make difficult decisions that may have run contrary to popular opinion. These decisions have included, but are certainly not limited to, issues involving criminal matters, civil rights, and economic legislation. It is necessary to have an equally powerful judicial branch of government in order to ensure that the balance of power is not

---

[26] In his concurrence, Justice Brickley writes that while he is "[t]roubled" by the 1987 amendment, he must concur with the majority because of the failure of the United States Supreme Court to "articulate any discernible limits on the constitutionality of retroactive . . . legislation. . . ." Op., p. 2.

I note that the argument advanced by the appellants, as well as my dissent are based on the Michigan Constitution of 1963. Therefore, the lack of United States Supreme Court guidance is not fatal to the appeal.

Furthermore, only in a parliamentarian system of government is the judiciary subject to a superior legislature. In our republican system, the judicial branch is the equal of legislative branch.

weighted in favor of the Legislature, and to ensure that individual rights are not circumvented by the will of the majority. Therefore, in order for this Court to maintain its equal position within our tripartite system of government, we must secure our constitutionally granted authority.

While it is understandable that emotions may run in favor of an injured employee and against a large corporation, this Court "can but construe the statute in question as it reads, and not as equitable consideration might impel us to do." *Bankers Trust Co, supra* 263 Mich. at 684-685, 249 N.W. 27. See n. 25. In *Chambers*, we unanimously interpreted the intent of the 1981 Legislature when it enacted 1981 P.A. 203. In 1987, the Legislature "overruled" our decision.

Therefore, I would hold that the 1987 Legislature ran afoul of the separation of powers and the one court of justice articles of the Michigan Constitution when it gave retroactive effect to 1987 P.A. 28.

Accordingly, I would reverse the decision of the Court of Appeals and apply the amendment prospectively from the date of its enactment, May 14, 1987.

GRIFFIN, Justice (dissenting).

While I agree with the Chief Justice that 1987 P.A. 28 violates Michigan's constitutional requirement of separation of powers,[1] I write separately to register my strong view that the enactment also contravenes the United States Constitution's Fourteenth Amendment due process guarantee.

I

In 1985, this Court unanimously held in *Chambers v. General Motors Corp.*, 422 Mich. 636, 651, 375 N.W.2d 715 (1985), that § 354 of 1981 P.A. 203, which became effective March 31, 1982, "clearly and unambiguously" permitted coordination, after its effective date, of certain employer-financed benefits, regardless of the date of injury.

A subsequent Legislature passed 1987 P.A. 28, which amended § 354[2] by reenacting the section's original language verbatim and adding four new subsections, M.C.L. § 418.354(17)-(20); M.S.A. § 17.237(354)(17)-(20). These amendments were made effective May 14, 1987. Section 354(17) expressly states the purpose of the legislation:

> "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 [375 N.W.2d 715] (1985) *is declared to have been erroneously rendered* insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. *It is the purpose of this amendatory act* to so affirm. This remedial and curative amendment shall be lib-

---

[1] Const. 1963, art. 3, § 2 and art. 4, § 1.

[2] 1987 P.A. 28.

erally construed to effectuate this purpose." (Emphasis added.)

Section 354(19) provides that any coordination prior to the act's effective date "shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest. . . ."

Thus, the 1987 amendment of § 354 was enacted not only for the declared purpose of reversing this Court's decision in *Chambers*, *supra*, but also to impose retroactively upon employers a substantial increase in liability for compensable periods *prior* to the act's effective date.

II

It is fundamental that this Court, not the 1987 Legislature, is entrusted by the constitution with the power to determine the meaning of the 1981 statute. *Webster v. Rotary Electric Steel Co.*, 321 Mich. 526, 531, 33 N.W.2d 69 (1948) (the proper construction of a statute is a judicial function); *Bankers Trust v. Russell*, 263 Mich. 677, 249 N.W. 27 (1933) (the Legislature may not exercise judicial power by construing a statute). In the past, we have declared:

> " 'It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. . . . Its members have no more right to construe one of its enactments retroactively than has any private individual.' " *Presque Isle Twp. Bd. of Ed. v. Presque Isle Co. Bd. of Ed.*, 364 Mich. 605, 612, 111 N.W.2d 853 (1961) (quoting *Northern Trust Co. v. Snyder*, 113 Wis. 516, 530, 89 N.W. 460 (1902)).

Article 3, § 2 of the Michigan Constitution provides: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

This Court has said: " 'To declare what the law shall be is legislative; to declare what it is or has been is judicial.' " *In re Manufacturer's Freight Forwarding Co.*, 294 Mich. 57, 63, 292 N.W. 678 (1940) (quoting *In re Application of Consolidated Freight Co.*, 265 Mich. 340, 343, 251 N.W. 431 [1933] [Potter, J., dissenting]). The Legislature, by enacting 1987 P.A. 28, not only declared what the law "shall be," but purported to declare what the intent of a prior Legislature "was."

Like other members of this Court, I am "troubled" by the Legislature's wording of § 354(17). I would go a step further, however, and state what should be obvious: the declaration by the 1987 Legislature concerning the intent of the 1981 Legislature is a nullity.

III

Many years ago another court explained why the policy against retroactivity is a fundamental principle of justice which limits legislative power:

> "Our constitutions do not admit the power assumed by the *Roman* prince; and the principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provisions on the subject; nor have we any for numerous other rights dear alike to freedom and to justice. An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning, when used

> in the constitution of the *United States*; yet laws impairing the previously acquired *civil* rights are equally within the reason of that prohibition and equally to be condemned. . . . [T]here is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression. . . ." *Dash v. Van Kleek*, 7 Johns 477, 505-506 (NY, 1811) (emphasis in original).

The fundamental distrust of retroactive laws has found expression in our rules of statutory interpretation which favor prospective application. DeMars, *Retrospectivity and retroactivity of civil legislation reconsidered*, 10 Ohio N.U.L.R. 253, 259 (1983). Moreover, because "[r]etroactive legislation has always been looked upon with disfavor . . . even its constitutionality has been conditioned upon a rationality requirement *beyond that applied to other legislation*." *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 223, 109 S.Ct. 468, 479, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring, emphasis added, citations omitted).

As the majority concedes, the retroactive aspects of 1987 P.A. 28 are different from those which were found constitutional by the United States Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). The differences are materially significant. Legislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to § 354 coordination regardless of the date of injury.

In *R.A. Gray & Co.*, the retroactive application of the legislation was restricted to a short five-month period preceding the statute's effective date. This retroactivity, according to the Court, was necessary in order to provide Congress time to legislate without a governmental agency suffering severe economic consequences resulting from employers withdrawing from multiemployer pension plans. In affirming the constitutionality of the legislation, the Court explicitly noted that,

> "the enactment of retroactive statutes 'confined to *short and limited periods* required by the practicalities of producing national legislation . . . is a customary congressional practice.' We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation. . . ." 467 U.S. at 731, 104 S.Ct. at 2719 (emphasis added, citation omitted).

Moreover, the Court cautioned that,

> "retroactive legislation *does* have to meet a burden *not* faced by legislation that only has future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, *and the justifications for the latter may not suffice for the former.*' " *Id.* at 730, 104 S.Ct. at 2718 (emphasis added).

In *Usery*, Congress enacted legislation requiring, inter alia, coal mine operators to compensate employees for black lung disease contracted during employment which had been terminated long before the effective date of the statute. In finding that the retroactive aspect of the legislation passed constitutional muster, the Supreme Court stated:

> "To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect—*although, as we have noted, the Act imposed no liability on operators until 1974*. . . .
>
> "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . *This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.*" 428 U.S. at 15-16, 96 S.Ct. at 2893 (emphasis added).

Justification for such retroactive legislation can be found in the fact that black lung disease develops over a long period of time and its symptoms, in many instances, do not become apparent until after termination of employment. *Usery*, *supra* at 7-8, 96 S.Ct. at 2888-89. No analogous justification appears in this case to justify undoing completed transactions.

More fundamentally, neither Congress nor the United States Supreme Court had affirmatively spoken on the issue of a coal mine operator's responsibility for black lung disease prior to enactment of the legislation considered in *Usery*. There the Supreme Court specifically recognized that the aggrieved party's reliance upon the prior state of the law is a factor in determining whether retroactive application of a statute can be legitimate. 428 U.S. at 17, 96 S.Ct. at 2893. It is one thing, however, to "rely" on the absence of law, and quite another to rely on an affirmative statement of the law as enacted by the Legislature and construed by the state's court of last resort.

It should be stressed that, prior to the majority's decision today, this Court never recognized or sanctioned a legislative attempt to overrule retroactively a decision of

this Court.[3] Nor has the United States Supreme Court given consideration to the effect of retroactive legislation upon conduct occurring after judicial interpretation but before the "overruling" legislation was enacted. However, one commentator noted the implications when he wrote, "Prima facie, this would seem to form a distinct problem, since such conduct would apparently be patterned after the first judicial interpretation and therefore unjustly undercut by the legislation. . . ." Slawson, *Constitutional and legislative considerations in retroactive lawmaking*, 48 Cal. L. R. 216, 249 (1960). Where a particular individual can "prove he had in fact relied on the interim state of the law to his detriment . . . it seems clear that he should be entitled to relief." *Id.*

The reliance by appellants on our decision in *Franks* was substantial. It appears that their increased liability by virtue of the majority's decision today, without reference to its effect upon other employers, will exceed $22 million. I do not agree with the majority's position that the reliance interest of appellants is inconsequential because it was not reduced to judgment. Such an assertion ignores the fact that appellants had no reason to seek a judgment. As we ruled in *Franks*, *supra*, the 1981 statute permitted employers to coordinate benefits without institution of any type of proceedings. 422 Mich. at 661, 375 N.W.2d 715.[4]

---

[3] Of course, no question is raised concerning the Legislature's power to enact legislation which may have the effect *prospectively* of overruling a decision of this Court. See, e.g., *Hurd v. Ford Motor Co.*, 423 Mich. 531, 377 N.W.2d 300 (1985) (enactment intended to overrule *Deziel v. Difco Laboratories, Inc.* (*After Remand*), 403 Mich. 1, 268 N.W.2d 1 (1978) (has prospective effect).

[4] To be sure, this Court has, on occasion, upheld the validity of retroactive legislation. However, a distinction must be drawn be-

(Footnote continued on following page)

I agree with the majority that "[t]he Legislature possesses the authority to enact workers' compensation laws

[4] *continued*
tween legislation that modifies benefits and liabilities prospectively based on prior conduct, and that which alters completed transactions. We recognized the distinction in *Franks*. While construing the original version of § 354, the Court said,

"We . . . disagree with the board's assumption that application of the coordination of benefits provision of § 354 to workers' compensation payments for compensable periods *after the effective date of the statute* would constitute retrospective application simply because the liability is based upon an injury that occurred prior thereto. As the board accurately observed . . . 'it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of *all* disabled workers should be *prospectively* coordinated after the effective date of the enactment *regardless of when they were injured.*' " 422 Mich. at 652-653, 375 N.W.2d 715 (first emphasis added, later emphasis in original, citation omitted).

In contrast to a statute like original § 354 which prospectively altered benefit levels based on a past injury, this Court noted that § 358 of 1980 P.A. 357 appeared to be "purely" retroactive. That section provided:

"Net weekly benefits payable under section 351, 361, or lump sum benefits under section 835, shall be reduced by 100% of the amount of benefits paid or payable to the injured employee under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.67a of the Michigan Compiled Laws, for identical periods of time and chargeable to the same employer."

In determining whether § 354 was intended to operate retroactively, we said:

"Although a statute is not regarded as operating retrospectively merely because it relates to an antecedent event, as we have already observed, application of the provisions of § 358 to impose a disability, in the form of a setoff, upon the amount of workers' compensation time periods *prior to the effective date of the legislation in question*, is purely retroactive." 422 Mich. at 671, 375 N.W.2d 715. (Emphasis added.)

This Court held that because § 358 was not merely procedural or remedial, and since it affected the substantive right of workers to receipt of payments existing prior to the statute's effective date, the statute was not to be applied retrospectively. 422 Mich. at 673, 375 N.W.2d 715.

that ' "increase the burden on the employer for disability or expenses *occurring or continuing after the date of enactment* of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time." ' " Op. p. 563 (quoting *Lahti v. Fosterling*, 357 Mich. 578, 592, 99 N.W.2d 490 (1959) (emphasis added). Unlike the majority, however, I would emphasize the word "after." Our past cases have limited the retroactive effect of such legislation by applying a change in benefit levels to those payments due *after* the effective date of an enactment. See *Lahti*, *supra* (amendment eliminating twenty-four-month limit on employer's liability for medical care could be retroactively applied to the extent that employers required to provide extended medical care to worker *after* the amendment's effective date notwithstanding that the injury occurred *before* the effective date), *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414 (1977) (the statute prohibiting a stay of seventy percent of benefits pending appeal of the referee's decision awarding compensation only applies to those benefits accruing after the statute's effective date), *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W.2d 184 (1984) (under statute increasing interest on workers' compensation award, where benefit payment is made *after* the effective date of the statute, interest is to be computed at twelve percent from the date the payment was due), *Franks*, *supra* (statute permitting coordination of benefits is *prospectively* coordinated *after* the effective date of the enactment regardless of when the employee was injured).

The majority concedes that the appellants' "reliance on the preexisting state of the law should be considered" in determining whether retroactive legislation is constitutional. Op., p. 563. However, the majority then asserts that appellants' reliance was not reasonable because the preexisting law was in "a state of flux." *Id.* at 563. I dis-

agree. After the Legislature enacts a statute which, according to this Court, "clearly and unambiguously" permits coordination of benefits without regard to date of injury, the law is not in a "state of flux." Given that this Court has never before recognized legislation purporting to overrule retroactively a decision by this Court interpreting the enactment of a prior Legislature, it could hardly be said that these appellants were on notice that the law might be changed in such a manner. Under the majority's analysis, the appellants apparently had no right to rely upon either the 1981 legislation or this Court's decision in *Franks*. Presumably, if the majority's analysis were correct, no employer or employee in this state would have the right to rely now upon 1987 P.A. 28 since the Legislature may change it retrospectively in its entirety tomorrow, next week, or next year.

As a matter of common sense, a citizen's reliance upon a statute as a statement of the law reasonably increases once the state's highest court interprets and declares what the statute means. To be sure, an individual can have no legitimate expectation that such a statute will not be subsequently changed prospectively; yet, it has been considered reasonable, at least until the majority's decision today, to expect that a statute will not be altered so as to reopen and significantly alter past transactions which have been completed in reliance upon the statute and its interpretation by the Court.

To dismiss, as the majority does, the argument of appellants that they justifiably relied on this Court's ruling in *Chambers* with the shibboleth that one may not expect that a socioeconomic law will not be retroactively changed, is to ignore the bounds of reason and fairness. As pointed out by Sutherland,

> "Analysis of the practical considerations influencing the question whether a retroactive application of a new law is fair and just should afford more meaningful standards of judgment than either catchpenny phrases or the ambivalent concept of 'vested.' . . .
>
> "One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated." 2 Sands, Sutherland Statutory Construction (4th ed), § 41.05, pp. 365-366.

Taking the majority's analysis to its logical conclusion would permit the Legislature to overrule decades-old decisions of this Court and impose retroactive liability for completed transactions conducted in accordance with those decisions, subject only to the nebulous requirement that the legislation is supported by any "legitimate legislative purpose." In order to protect this Court's status as the final arbiter of what the law is, and to secure the guarantee of due process, I would hold that the Legislature may not retroactively undo past transactions completed in reliance upon a decision of this Court.

Accordingly, I would reverse the decision of the Court of Appeals.

APPENDIX B

Evert Romein,
Plaintiff-Appellant,
v.
General Motors Corporation,
Defendant-Appellee,

Attorney General Frank J. Kelley,
Intervening Defendant-Appellee.

Arturo Gonzalez,
Plaintiff-Appellee,
v.
Ford Motor Company,
Defendant-Appellant,

Attorney General Frank J. Kelley,
Intervening Defendant-Appellee

Docket Nos. 101298, 101510

Court of Appeals of Michigan

Submitted January 14, 1988, Decided, May 16, 1988

JUDGES: Shepherd, P.J., and Wahls and G. B. Ford,* JJ.

OPINION BY: WAHLS

These consolidated cases require us to determine the constitutionality of statutory amendments to the Workers' Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237 (101) *et seq.* Those amendments, set forth in 1987 PA 28, MCL 418.354(17)-(20); MSA 17.237 (354)(17)-(20), provide, in part, that workers' compensation payments resulting from liability pursuant to §§ 351, 361 or 835 of the act for personal injuries occurring before March 31, 1982,

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

should not be coordinated with other employer-financed benefits specified in § 354, and that, if an employee's benefits were so coordinated previously, reimbursement with interest of the amounts withheld should be made. The employers in the present cases argue that the amendments, which are applicable retroactively to cases involving injuries which occurred before March 31, 1982, first, "violate the due process and contract clauses of the federal and state constitutions by retroactively imposing additional liability upon employers for past compensable periods," and, second, "violate the separation of powers and the one court of justice clauses of the Michigan constitution of 1963." We disagree and conclude that neither of these constitutional challenges possesses merit.

BACKGROUND

In order to place in context the issues presented in this case, it is necessary to review briefly the legislative history of the challenged statute. In 1980 and 1981, the Legislature enacted several amendments to the Workers' Disability Compensation Act. As part of those amendments, the benefit rate structure was changed, providing for an increase in weekly compensation from two-thirds of an employee's average weekly wages to eighty percent of an employee's after-tax average weekly wages. 1980 PA 357 MCL 418.351; MSA 17.237(351). Another portion of the workers' compensation reforms, 1981 PA 203, which became effective on March 31, 1982, reduced an employer's liability for workers' compensation benefits by the amount of certain other employer-financed benefits (e.g, social security old-age insurance, pension, retirement, wage continuation, self-insurance, disability insurance) received by the employee. MCL 418.354; MSA 17.237(354). This setoff or "coordination" of benefits was intended to eliminate the duplication of benefits for injured workers and thus avoid creating a disincentive to work.

After § 354 became effective on March 31, 1982, some employers began to coordinate the workers' compensation benefits of many of their retired or disabled employees, including some employees who had been injured prior to March 31, 1982. As a result, employees injured before that date were being subjected to a reduction of benefits through coordination, even though they did not receive the increased maximum benefit rates pursuant to the statutory amendment. In *Chambers v. General Motors Corp.*, 1982 WCABO 132, the Workers' Compensation Appeal Board held that the § 354 coordination-of-benefits provision could not be applied to claimants injured before March 31, 1982. Similarly, this Court, in *Franks v. White Pine Copper Division, Copper Range Co.*, 122 Mich. App. 177, 184-185, 332 N.W.2d 447 (1982), observed that the Legislature did not intend for employees injured before March 31, 1982, to have their workers' compensation benefits coordinated, citing Senate Concurrent Resolution No. 575, which stated that the coordination legislation in § 354 "was not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date," and that the coordination of benefits provided for in § 354 was "not to be applied retroactively to those receiving worker's disability compensation payments or those injured prior to the effective date of this act."

Nevertheless, the Supreme Court, in reviewing *Chambers*, *Franks*, and a third consolidated case, held that the Legislature in fact intended that the benefits of all disabled employees be coordinated after March 31, 1982, even if some of those employees were injured before that date. *Franks v. White Pine Copper Div.*, 422 Mich. 636, 664, 375 N.W.2d 715 (1985). Based on the Supreme Court's decision in *Franks*, employers who had been coordinating the workers' compensation benefits of employees injured

before March 31, 1982, could continue to coordinate those benefits, and some employers who had not been coordinating the benefits of their disabled employees who were injured before March 31, 1982, required those employees to pay back the money that had been "overpaid" to them since that date.

On December 30, 1985, the Supreme Court denied a motion to rehear the consolidated cases. However, the author of the *Franks* decision, Justice Patricia J. Boyle, dissented, voting to grant the motion for rehearing. Justice Boyle opined that reconsideration led her to believe—contrary to her earlier expressed view that the plain meaning of § 354 required the coordination of benefits for all disabled employees after March 31, 1982—that the language of § 354 "is ambiguous and requires construction," and that "[the] incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases." 424 Mich. 1203. Moreover, Chief Justice Williams and Justice Cavanagh, while concurring in the denial of the motion for rehearing, wrote separately to clarify that their denial intimated no opinion regarding employers' attempts to recoup overpayments.

There was significant public reaction criticizing the Supreme Court's decision in *Franks*. Critics included members of the Legislature that had passed § 354; James M. Brakora, Director of the Bureau of Workers' Disability Compensation; and former Governor William G. Milliken. In a letter dated October 25, 1985, Governor Milliken stated that the Supreme Court had misconstrued the intent of his administration and the Legislature because "[it] was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments." In response to the *Franks* opinion, the Legislature adopted 1987 PA 28, which became effective on May 14, 1987, the relevant portions of which provide:

(17) The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to sections 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

(18) This section applies to payments resulting from liability pursuant to sections 351, 361 or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to sections 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier.

(19) Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to sections 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier.

(20) Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier. [MCL 418.354 (17)-(20); MSA 17.237(354) (17)-(20).]

FACTS AND PROCEDURAL HISTORY

In Docket No. 101298, plaintiff, Evert Romein, was receiving workers' compensation benefits of $99 per week due to injuries he sustained on December 5, 1977, while working for defendant, General Motors Corporation. In September, 1983, GMC began coordinating Romein's workers' compensation benefits based upon his receipt of pension and social security old-age benefits. As a result of this coordination, his benefits were reduced to zero dollars. In June, 1984, a hearing referee in the Bureau of Workers' Disability Compensation ordered that Romein's workers' compensation benefits be paid without coordination and that GMC pay a $1,500 penalty. On May 20, 1987, the WCAB, citing the Supreme Court's decision in *Franks*, reversed the referee's determination, prompting Romein to apply for leave to appeal in this Court.

In Docket No. 101510, plaintiff, Arturo Gonzalez, was receiving workers' compensation benefits of $176 per week pursuant to a voluntary agreement of the parties due to a disabling lung condition Gonzalez allegedly had developed as a consequence of his exposure to certain materials while working for defendant, Ford Motor Company. In August, 1982, Ford began to coordinate Gonzalez's benefits with other benefits he received, thus reducing his weekly workers' compensation payment to zero dollars. In September, 1984, a hearing referee in the Bureau of Workers' Disability Compensation found that Ford had improperly coordinated and reduced Gonzalez's benefits, and ordered Ford to pay a $1,500 penalty. On May 27, 1987, the WCAB, citing 1987 PA 28, found that Ford

could not coordinate Gonzalez's benefits, prompting Ford to apply for leave to appeal in this Court.

In September, 1987, this Court granted leave to appeal in both cases, consolidating them for accelerated consideration.[1]

ISSUES

First, GMC and Ford argue that subsections 17 through 20 of § 354 violate the due process, U.S. Const., Am. XIV; Const. 1963, art. 1, § 17, and impairment of contract, U.S. Const., art. I, § 10; Const. 1963, art. 1, § 10, clauses of the United States and Michigan Constitutions by retroactively imposing an additional obligation upon employers, i.e., "by retroactively imposing additional liability upon employers for past compensation periods." We disagree with this argument because the challenged retroactive legislation is justified by a rational legislative purpose, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976); *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 476 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). Most important to our conclusion is that the retroactivity of the legislation does not abrogate a vested or contractual right of the employers in the consolidated cases before us. Indeed, we find that the employers enjoy no extrastatutory, vested or contractual right in these cases which could prohibit the Legislature from making a retroactively applicable change, at

[1] Subsequent to the date these consolidated cases were submitted to this Court for decision and oral argument was conducted, counsel for the parties unilaterally filed supplemental briefs, including a letter and exhibit by counsel for defendants, a reply by counsel for plaintiffs, and a response to plaintiffs' reply by counsel for defendants. These documents were improperly filed, MCR 7.212(F), and shall not be considered by this Court in rendering its decision, MCR 7.212(H).

any time, in the remedies afforded employees under the statutory provision now at issue.

The Workers' Disability Compensation Act is remedial in nature and was enacted primarily to benefit the employees, not the employers, subject to its provisions. *Norwin v. Ford Motor Co.*, 132 Mich. App. 790, 795, 348 N.W.2d 703 (1984), lv. den. 424 Mich. 871 (1986); *Lahti v. Fosterling*, 357 Mich. 578, 589, 99 N.W.2d 490 (1959). Moreover, the social and legal context in which subsections 17 through 20 of § 354 were enacted makes it clear to us that the Legislature was prompted to act by the desire to remedy a situation in which certain employees were receiving coordinated workers' compensation benefits pursuant to § 354 but with the disadvantage of also receiving pre-1980 rates. Indeed, subsection 17 itself describes the amendatory subprovisions as "remedial and curative." We cannot quarrel with this description.

Moreover, in the *Franks* opinion itself, the Supreme Court stated that "[w]orkers' compensation benefits are social-welfare income-maintenance benefits" and declared, citing *Lahti*, *supra*, pp. 591-592, and *Shavers v. Attorney General*, 402 Mich. 554, 620, 267 N.W.2d 72 (1978), that "[i]ncome-maintenance benefits payable under a legislatively mandated social welfare program are not property protected by the Due Process Clause, the Contract Clause, or the Takings Clause from substantive change by subsequent legislation. . . ." 422 Mich. 654. See also *Rookledge v. Garwood*, 340 Mich. 444, 452-457; 65 N.W.2d 785 (1954); *Crilly v. Ballou*, 353 Mich. 303, 307-308, 91 N.W.2d 493 (1958); *Lahti*, *supra*; *McAvoy v. H. B. Sherman Co.*, 401 Mich. 419, 456-460, 258 N.W.2d 414 (1977); *Karl v. Bryant Air Conditioning Co.*, 416 Mich. 558, 575, 331 N.W.2d 456 (1982); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 12-15, 345 N.W.2d 184 (1984); *Freij v. St. Peters Evangelical Lutheran Church*, 72 Mich. App. 456, 250 N.W.2d 78 (1976),

lv. den. 399 Mich. 862 (1977); Hochman, *The supreme court and the constitutionality of retroactive legislation*, 73 Harv. L. R. 692, 704-706 (1960); Note, *Rediscovering the contract clause*, 97 Harv. L. R. 1414, 1427 (1984). The right of the employers in these consolidated cases to coordinate the workers' compensation benefits of employees whose benefits were paid as a result of their employers' liability for personal injuries sustained prior to March 31, 1982, is derived from § 354, and thus is a statutory right. The Supreme Court has clarified that "a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti*, *supra*, p. 589. Since the legislation challenged by the employers in the instant cases is remedial in nature, and since the employers' right to coordinate the workers' compensation benefits of the employees at bar is not a vested right, it follows with syllogistic certainty that § 354(17)-(20) may operate retrospectively: "A remedial or procedural statute may operate retrospectively if it does not 'take away vested rights.' " *Karl*, *supra*, p. 575. See DeMars, *Retrospectivity and retroactivity of civil legislation reconsidered*, 10 Ohio North L. R. 253, 261-264 (1983). The right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was revoked by the Legislature. What the Legislature gave, it could take away. *Rookledge*, *supra*, p. 457; *Lahti*, *supra*, pp. 588-589; *Franks*, *supra*, p. 654.

Second, GMC and Ford argue that subsections 17 through 20 of § 354 violate the separation of powers, Const. 1963, art. 3, § 2, and the one court of justice, Const. 1963, art. 6, § 1, clauses of the Michigan Constitution. The employers reason that, after the Supreme Court, in *Franks*, *supra*, declared what the law is under § 354 regarding an employer's ability to coordinate the workers' compensation benefits of employees such as those in the present cases,

the Legislature, by passing subsections 17 through 20 of § 354, in an attempt to change retroactively what the Court had declared, usurped a judicial function. In their brief on appeal, the employers in these cases place great emphasis on the assertion that it is "unprecedented in the law" for a Legislature to reverse and overrule a court decision by passing a statute with retroactive applicability.

We find the employers' suggestion regarding the unprecedented nature of the challenged legislation to represent an indulgence in hyperbole. Such legislation may be included in that type of statutory enactment denominated as "curative." Curative legislation has been defined as legislation enacted to cure defects in prior law. 2 Sands, Sutherland Statutory Construction (4th ed.), § 41.11, p. 410. See Note, *Congressional reversal of supreme court decisions: 1945-1957*, 71 Harv. L. R. 1324 (1958) Hochman, *The supreme court and the constitutionality of retroactive legislation*, 73 Harv. L. R. 692 (1960). As an example, we will cite a recent occurrence of such legislation in the federal forum. In 1981, the United States Supreme Court held that the term "wages" must be interpreted consistently for purposes of both income-tax withholding and the Federal Insurance Contributions Act (FICA). *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 101 S. Ct. 2288, 68 L. Ed. 2d 814 (1981). In 1983, Congress partially codified and partially overruled the Supreme Court's holding in *Rowan* by amending the Social Security Act to, among other things, permit the Treasury Department to interpret the term "wages" differently for income-tax withholding and FICA purposes. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, codified at 26 U.S.C. 3121(a). In 1984, Congress passed a provision making the 1983 change retroactively applicable to instances predating the 1983 amendment. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1160. In

the wake of the statutory amendments, courts have recognized that Congress acted in reaction to the Supreme Court's decision in *Rowan*, and in fact intended to overturn the underlying premise in that decision that the term "wages" must be interpreted consistently for purposes of both income-tax withholding and the FICA. See *Temple University v. United States*, 769 F.2d 126 (CA 3, 1985), cert. den. ____ U.S. ____, 106 S. Ct. 2914, 91 L. Ed. 2d 544 (1986); *Canisius College v. United States*, 799 F.2d 18 (CA 2, 1986), cert. den. ____ U.S. ____, 107 S. Ct. 1887, 95 L. Ed. 2d 495 (1987); *McCoy v. Comm'r of Internal Revenue*, 809 F.2d 333 (CA 6, 1987), app. pending; *John Carroll University v. United States*, 643 F. Supp. 675 (N.D. Ohio, 1986).[2]

We find the employers' argument on this issue to be meritless. The Legislature, in passing subsections 17 through 20 of § 354, did not attempt to direct the courts in the exercise of judicial power or to infringe on that power in any way; rather, it merely sought to cure a defect in a prior law erroneously interpreted by the Supreme Court. As noted in plaintiffs' briefs on appeal, the Legislature's amendatory language simply makes "explicit [the] . . . retrospective legislative purpose which the Supreme Court found in [*Franks*] to be wanting in the 1981 version of Section 354." Under such a circumstance, we detect no violation of the separation of powers or the one court of justice clause of the Michigan Constitution.

---

[2] For other cases in which courts have recognized a Legislature's right to cure retroactively a court's erroneous interpretation of a statute, see, e.g., *Battaglia v. General Motors Corp.*, 169 F.2d 254 (CA 2, 1948), cert. den., 335 U.S. 887; 69 S. Ct. 236; 93 L. Ed. 425 (1948); *Fisch v. General Motors Corp.*, 169 F.2d 267 (CA 6, 1948), cert. den., 335 U.S. 902; 69 S. Ct. 405; 93 L. Ed. 436 (1949); *Long v. United States Internal Revenue Service*, 742 F.2d 1173 (CA 9, 1984); *Bd. of Ed. of East Windsor Regional School Dist. v. Diamond*, 808 F.2d 987 (CA 3, 1986).

Since we uphold the validity of § 354(17)-(20) despite the constitutional challenges raised by the employers in these consolidated cases, we affirm the WCAB's decision in the appeal of Arturo Gonzalez and reverse the decision in the appeal of Evert Romein. However, in light of the confusion in the law regarding the issues presented in these cases, and the fact that a substantial question of statutory construction was involved, we find that penalty benefits should not be assessed against the employers. MCL 418.801(2); MSA 17.237(801)(2).

The decision in *Romein* is reversed and the decision in *Gonzalez* is affirmed as modified.

APPENDIX C

ORDER

MICHIGAN SUPREME COURT

ENTERED: December 27, 1990

EVERT ROMEIN,
Plaintiff-Appellee,
and
ATTORNEY GENERAL FRANK J. KELLEY,
Intervenor-Appellee,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant.

SC: 83830-1
COA: 101298, 101510
LC: WCAB NO. 373, 108

ARTURO GONZALEZ,
Plaintiff-Appellee,
and
ATTORNEY GENERAL FRANK J. KELLEY,
Intervenor-Appellee,
v.
FORD MOTOR COMPANY,
Defendant-Appellant

Supreme Court of Michigan
December 27, 1990, Entered

On order of the Court, the motion by defendants-appellants for a stay is considered.

IT IS ORDERED that until final resolution of these consolidated cases by the United States Supreme Court, the parties to this action, the parties to *Michigan Mutual Insurance Co*, Court of Appeals Case No. 104980, and all other persons who receive actual notice of this Order, by personal service or otherwise, are restrained from enforcing or acting under the retroactive provisions of 1987 PA 28, subsections 345 (17)-(20), MCL 418.354(17)-(20), insofar as these subsections relate to workers suffering personal injury before March 31, 1982 and would otherwise require reimbursement of worker's disability compensation payments coordinated pursuant to section 354 during compensable periods after March 31, 1982 and before May 14, 1987.

This Order is issued to enable defendants-appellants to seek issuance of a writ of certiorari from the United States Supreme Court. If an application for a writ of certiorari is not made within the period allotted therefor, an order granting the application is not made or the conditions of MCR 7.209(F)(1) are not complied with, then the Court will vacate this Order. Upon the vacating of this Order, subsections 354(17)-(20) of 1987 PA 28, MCL 418.354(17)-(20) shall become enforceable according to their terms, including payment pursuant to subsection 354(19) within 60 days of the date this Order is vacated.

No security is required of any party, person or firm.

Cavanagh and Boyle, JJ., would deny the motion for stay.

APPENDIX D

ORDER

MICHIGAN SUPREME COURT

ENTERED: December 5, 1990

EVERT ROMEIN,
Plaintiff-Appellee,

and

ATTORNEY GENERAL
FRANK J. KELLEY,
Intervenor-Appellee,

SC: 83830
COA: 101298
LC: WCAB NO. 373

v.

GENERAL MOTORS
CORPORATION,
Defendant-Appellant.

ARTURO GONZALEZ,
Plaintiff-Appellee,

and

ATTORNEY GENERAL
FRANK J. KELLEY,
Intervenor-Appellee,

SC: 83831
COA: 101510
LC: WCAB No. 108

v.

FORD MOTOR COMPANY,
Defendant-Appellant

Supreme Court of Michigan

December 27, 1990, Entered

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

The motion by the Michigan Association of Insurance Companies and others for leave to file a brief *amicus curiae* is considered and it is GRANTED. The motion by the Michigan Self-Insurer's Association for leave to file a brief *amicus curiae* is also considered and it is DENIED.

Riley, C.J., and Griffin, J., would grant rehearing.

APPENDIX E

Opinion of Workers' Compensation Appeal Board

DEC. #373

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

EVERT ROMEIN,
SS #362-46-5198
PLAINTIFF,

vs.

GENERAL MOTORS CORPORATION,
PONTIAC MOTOR DIVISION,
DEFENDANT.

APPEAL FROM
ADMINISTRATIVE LAW JUDGE LAPORTE

DECISION ON REVIEW

ZURVALEC, MEMBER OF THE APPEAL BOARD

Plaintiff, born June 2, 1912, was working as a welder for defendant on or about December 5, 1977, when he fell 25 feet from a ladder after being struck by a swinging door. He sustained fractures to his pelvis and right rib. Defendant began to pay workers' compensation benefits to him on a voluntary basis. Subsequently, plaintiff filed a petition for hearing received September 24, 1979, alleging personal injury or disablement from occupational disease occurring on or about December 5, 1977, in the nature of fractures of the pelvis and left hip, industrial loss of use of both legs and disability from the field of skilled labor.

Hearings were held October 15 and November 14, 1980, before Administrative Law Judge Leo LaPorte. By decision

mailed December 18, 1980, the administrative law judge found that plaintiff had received a personal injury arising out of and in the course of his employment in skilled labor on December 5, 1977, and that plaintiff was disabled. He further found, however, that plaintiff had not sustained the burden of proving total and permanent disability, dismissed the Second Injury Fund and ordered defendant to continue paying weekly maximum payments, reduced by age and medical care. Plaintiff's timely appeal of this decision was dismissed at his request by Board order mailed February 6, 1981.

On July 22, 1982, defendant filed a Form 107 Notice of Dispute stating that it would begin to coordinate plaintiff's workers' compensation benefits due after March 31, 1982, the effective date of § 418.354. Plaintiff filed a petition for hearing received November 16, 1983, containing the same allegations as his original petition. By letter dated November 14, received November 15, 1983, plaintiff's counsel requested a Rule V hearing because of defendant's alleged termination of benefits, asking for recoupment and application of penalty. A hearing was held May 14, 1984, before Administrative Law Judge LaPorte, who by decision mailed June 28, 1984, found that:

> "Section 354 is not retro-active. Defendant must pay in accordance with the decision mailed 12/18/80, or attempt to modify the decision. Interest of 12% applies to the amounts incorrectly withheld. Defendant will pay $1500.00 penalty. The filing of a Notice of Dispute does not constitute a dispute when an open award exists."

Defendant filed an appeal of this decision received July 9, 1984.

After the administrative law judge's decision mailed June 28, 1984, defendant filed a Motion to Stay applica-

tion of Section 418.862 (payment of 70% benefits pending appeal) which was denied by Board order mailed January 9, 1985. Then plaintiff filed a Motion to Dismiss defendant's appeal of the June 28, 1984, decision for failure to pay either 70% or 100% benefits which was also denied by this Board in an order mailed April 4, 1985. Plaintiff began to file petitions for Rule V penalty hearings for failure to pay full amount of 70% benefits accrued, received April 8, April 18, May 7, May 24, June 21, October 8, September 30, and October 7, 1985. Administrative Law Judge LaPorte held a hearing on November 20, 1985, thereafter issuing a decision mailed April 9, 1986, in which he found:

FINDINGS OF FACT:

> This case is submitted by briefs. Decision mailed 6-28-84 required payment without co-ordination, 12% interest, and $1,500.00 penalty. Plaintiff was receiving alternate benefit's. (sic)

CONCLUSIONS OF LAW:

> *Chambers v. General Motors Corp., 422* Mich. *636*, issued 10/7/85 determined that coordination was retroactive. This had been defendant's position. Plaintiff was THUS overpaid. It would be pointless and needlessly rigid to require further overpayments because of procedural technicalities.

Administrative Law Judge LaPorte's decision mailed April 9, 1986, was not appealed by either party. Consequently, the only decision before us on appeal is that of June 28, 1984, which the Administrative Law Judge declined to enforce in later proceedings.

We hereby reverse the administrative law judge's holding that MCLA 418.354 could not be applied retroactively. *Chambers* v. *General Motors Corp.*, 422 Mich. 636 (1985) held that the set off provided for in Section 354 applies

to benefits attributable to periods after March 31, 1982, the effective date of the Act, regardless of the date of injury. Defendant is entitled to coordinate plaintiff's pension and social security old age benefits after March 31, 1982 pursuant to Section 354(1)(a)(d) and (7). We modify the award of interest from 12% to 10% on all unpaid weekly compensation, if any, from due dates until paid. *Civil Service Commission* v. *Department of Labor*, 424 Mich. 571 (1986); *Selk* v. *Detroit Plastic Products*, 419 Mich. 1 (1984) (On Resubmission) 419 Mich. 32 (1984). We reverse the award of $1,500.00 penalty which the administrative law judge declined to enforce himself in his decision mailed April 9, 1986.

Plaintiff requests that we order defendant to make an accounting of all benefits reduced or coordinated to date under either Section 354 or Section 357 of the Act. Defendant filed a Form 101, received by the Bureau October 25, 1985, indicating plaintiff's average weekly wage at $370.40, one dependent, a weekly compensation base rate of $99.00, Social Security coordination of $81.41 plus a compensation supplement of $21.00. Plaintiff has not provided any figures for us to compare against the Form 101. There is no indication whatsoever in the file that any benefits were improperly coordinated prior to March 31, 1982. With no argument raised beyond a vague uncertainty that benefits might have been improperly coordinated, we are not persuaded such an accounting is appropriate and decline to so order.

Member Batts concurs.

Dated and entered at Lansing, Michigan, this 20th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Lori A. Zurvalec

Derek T. Batts Members

Opinion of Workers' Compensation Appeal Board

DEC. #373

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

EVERT ROMEIN,
SS #362-46-5198
PLAINTIFF,

vs.

GENERAL MOTORS CORPORATION,
PONTIAC MOTOR DIVISION,
DEFENDANT.

This cause having come before the Appeal Board on appeal by defendant from the decision mailed on June 28, 1984, of Administrative Law Judge Leo LaPorte, denying retroactive coordination of compensation benefits pursuant to MCLA Section 418.354(1); after due consideration of the evidence taken and the briefs of counsel, the Board having made a finding of facts and law, and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be reversed in part and modified in part, Now, Therefore;

IT IS ORDERED, That the decision of the administrative law judge in this cause shall be and it hereby is reversed as to the retroactivity of MCLA Section 418.354(1) and the award of $1,500.00 penalty;

IT IS FURTHER ORDERED That interest on all unpaid weekly compensation, if any, from due dates until paid shall be at the rate of 10% per annum. *Civil Service Commission* v. *Department of Labor*, 424 Mich. 571

(1986); *Selk* v. *Detroit Plastic Products*, 419 Mich. 1 (1984) (On Resubmission) 419 Mich. 32 (1984).

Dated and entered at Lansing, Michigan, this 20th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Lori A. Zurvalec

Derek T. Batts Members

Opinion of Workers' Compensation Appeal Board

OPN. #108

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

ARTURO GONZALEZ,
SS #365-36-5761
PLAINTIFF,

vs.

FORD MOTOR COMPANY,
DEFENDANT.

APPEAL FROM
ADMINISTRATIVE LAW JUDGE FOSTER
JAMES M. O'REILLY FOR THE PLAINTIFF,
MARTIN L. CRITCHELL & ALAN S. GOROSE
FOR THE DEFENDANT.

OPINION ON REVIEW

GOOLSBY, MEMBER OF THE APPEAL BOARD

Defendant appeals from the decision, mailed October 10, 1984, of Administrative Law Judge Andrew Foster that "defendant improperly coordinated and reduced benefits due and owing plaintiff."

The administrative law judge further found that "MCLA 418.354 does not apply retrospectively to plaintiff's claim since plaintiff's injuries of January 1, 1981 were prior to the effective date of the Act." The administrative law judge also assessed a $1,500.00 penalty against defendant for its failure to pay full weekly benefits for all violations which occurred prior to filing Notice of Dispute, July 29, 1982. We reverse.

At the time this dispute arose, plaintiff was being paid weekly compensation at the rate of $176.00 pursuant to a voluntary agreement of the parties, dated September 24, 1981.

The dispute was submitted to the administrative law judge on a stipulated set of facts:

We further find that the assessment of a penalty in this case was improper. Pursuant to Section 801(2), penalties are assessable only when compensation is due and payable and there is no ongoing dispute between the parties. The *Chambers* court rejected the requirement that an employer must file a petition before coordinating benefits under Section 354:

> "Section 354 contains no provision requiring the employer to file a petition and present proofs at an evidentiary hearing prior to coordinating an employee's benefits. The express language of subsection (10) makes it clear that what is required of the employer is that it report the credit or reduction in benefits and provide proof of the basis for it if requested by the Bureau." At 661.

The file contains such a report, Form 101-b.

The *Chambers* court determined that such a procedure does not deny due process, because if insufficient evidence is presented or the director is not satisfied that the Act is not being complied with, he or she may convene a Rule 5 hearing. If the claimant is not satisfied with the director's actions, he or she may file for a hearing pursuant to MCL 418.847; MSA 17.237(847); AC, R 408.34. *Chambers*, *supra*, at 661-662.

Although we have concluded that the administrative law judge was wrong in his decision, we note that the Legislature has recently enacted 1987 PA 28, with immediate

effect, which unequivocally reverses the ruling, in *Chambers*, *supra*. The following language has been added to Section 354:

> "(17) The decision of the Michigan Supreme Court in *Franks* v. *White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

Accordingly, the administrative law judge is reversed, but defendant must now comply with the dictates of 1987 PA 28.

> "Petitioner, ARTURO GONZALEZ, was employed by the Ford Motor Company from June 9, 1953, until December 31, 1980. Upon retirement from Defendant Company he filed a Workers' Compensation Claim, alleging, among other things, that he developed a disabling lung condition as a consequence of his foundry exposure for the previous twenty years.
>
> Physical examinations performed during the pendency of his claim proved conclusively that he suffered from silicosis in both lungs. Submission of these medical reports to the Silicosis and Dust Disease Fund resulted in an agreement that they would reimburse Defendant Company for all weekly benefits paid in excess of Twelve Thousand Five Hundred ($12,500.00) Dollars.
>
> A Voluntary Payment Form was submitted to the Bureau on September 24, 1981, signed by the counsel for both parties, stating that weekly benefits of $176.00 were to be paid to Petitioner from January 1, 1981, on a continuing basis and further stating that

the Silicosis and Dust Disease Fund had agreed to reimburse Ford Motor Company for all weekly benefits paid in excess of $12,500.00, pursuant to the statute.

In a letter dated August 9, 1982, Petitioner was informed that, effective March 31, 1982, weekly benefits were being reduced as provided by Section 418.354 of the Act. This reduced his weekly benefit rate from $176. to $0."

Both counsel apparently submitted briefs on the matter to the administrative law judge although the file only contains that of plaintiff.

In *Chambers* v. *General Motors Corp.*, 422 Mich. 636 (1985), the Supreme Court determined that MCL 418.354 is procedural, and applies retroactively, regardless of the date of injury. Thus, the holding in *Chambers* negates the basis of the decision of the administrative law judge in this case.

Pursuant to the *Chambers* holding, defendant was within its right to coordinate plaintiff's pension benefit effective March 31, 1982, the date that Section 354 became effective. The fact that defendant was entitled to reimbursement from the Silicosis and Dust Disease Fund for all weekly benefits paid in excess of $12,500 did not affect defendant's right to apply the provisions of Section 354.

Because of this recent amendment, we see no reason to address defendant's reimbursement issue, as it is now moot.

Member Smith concurs.

Dated and entered at Lansing, Michigan, this 27th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Garry Goolsby

Sharon L. Smith Members

Opinion of Workers' Compensation Appeal Board

OPN. #108

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

ARTURO GONZALEZ,
SS #365-36-5761
PLAINTIFF,

vs.

FORD MOTOR COMPANY,
DEFENDANT.

This cause having come before the Appeal Board on appeal by defendant from the decision mailed on October 10, 1984, of Administrative Law Judge Foster, denying defendant the right to coordinate benefits pursuant to MCL 418.354 and assessing a penalty of $1,500 against defendant; after due consideration of the stipulated facts presented and the briefs of counsel, the Board having made a finding of facts and law, and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be reversed, Now, Therefore;

IT IS ORDERED, That the decision of the judge in this cause shall be and it hereby is reversed.

Dated and entered at Lansing, Michigan, this 27th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Garry Goolsby

Sharon L. Smith Members

APPENDIX F

1. Article I, Section 10 of the United States Constitution provides in relevant part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

2. The Fourteenth Amendment to the United States Constitution, Section 1, provides in relevant part:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law.

3. Michigan Statute Annotated § 418.354 provides in relevant part:

> (1) This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
>
> (a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act.
>
> (b) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee di not

> contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If such self-insurance plans, wage continuation plans, or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery.
>
> (c) The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did contribute directly to the payment of premiums regarding the disability insurance policy.
>
> (d) The after-tax amount of the pension or retirement payments received or being received pursuant to a plan or program established or maintained by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did not contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.
>
> (e) The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom bene-

fits under sections 351, 361, or 835 are received, if the employee did contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.

(f) For those employers who do not provide a pension plan, the proportional amount, based on the ratio of the employer's contributions to the total contributions made to a qualified profit sharing plan under section 401(a) of the Internal Revenue Code or any successor to section 401(a) of the Internal Revenue Code covering a profit sharing plan which provides for the payment of benefits only upon retirement, disability, death, or other separation of employment to the extent that benefits are vested under the plan.

* * * * *

(9) Except as otherwise provided in this section, any benefit payments under the Social Security Act, or any fund, policy, or program as specified in subsection (1) which the employee has received or is receiving after March 31, 1982 and during a period in which the employee was receiving unreduced compensation benefits under section 351, 361, or 835 shall be considered to have created an overpayment of compensation benefits for that period. The employer or carrier shall calculate the amount of the overpayment and send a notice of overpayment and a request for reimbursement to the employee. Failure by the employee to reimburse the employer or carrier within 30 days after the mailing date of the notice of request for reimbursement shall allow the employer or carrier with the approval of the bureau to discontinue 50% of future weekly compensation payments under section 351, 361 or 835. The compensation payments withheld shall be credited against the amount of the overpayment. Payment of the appropriate compensation benefit shall resume when the total amount of the overpayment has been withheld.

(10) The employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the bureau the amount of any credit or reduction, and as requested by the bureau, furnish to the bureau satisfactory proof of the basis for a credit or reduction.

* * * * *

(17) The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

(18) This section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier.

(19) Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of

this subsection, to the employee by the employer or carrier.

(20) Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier.

(21) If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of this section.

4. Michigan Statute Annotated § 418.833 provides in relevant part:

(1) If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

APPENDIX G

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

United States of America

American Renaissance Insurance Company
Autolatina America, Inc.
Dearborn Capital Corporation
Dobco Life Insurance Company
Fairlane Life Insurance Company
Ford Holdings, Inc.
Jaguar Cars Inc.
Lincoln-Rowe Management
Shoppers Mart, Inc.
The Hertz Corporation

Argentina

Autolatina Argentina S.A. de Ahorro Para Fines Determinados
Invercred Compania Financiere S.A.
Jaguar Holdings Limited
Transax Sociedad Anonima, Comercial Industrial y Financiera
Volkswagen Inversiones S.A.
Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

Australian Road Credit Limited
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company of Australia Limited
Ford New Holland Australia Limited
Ford Sales Company of Australia Limited
New Holland Holdings Pty., Limited
Oscrite Limited

Austria

Ford Bank Aktiengesellschaft
Ford Motor Company (Austria) K.G.

Belgium

Ford Credit N.V.
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited

Brazil

Apolo—Administradora de Bens S/C Ltda.
Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda.
Autolatina Financiadora S.A.—Credito, Financiamente e Invest.
Autolatina Leasing S/A—Arrandamente Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribuidora de Productos de Petroleo Ltda.
Fundacao Autolatina
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Transglobal Corretagen de Seguros Ltda.
Volkswagen de Brasil S/A
Volkswagen Factoring—Fomento Comercial S/A

Canada

Canadian Road Credit Company
Ford Credit A/S
Ford Credit Canada Limited
Ford Motor Company of Canada, Limited
Halla Climate Control Canada, Inc.
Jaguar Canada, Inc.

Denmark

Ford Motor Company A/S
Ford New Holland Scandinavia A/S

England

Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited
Aston Martin Lagonda Limited
Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Auto Club International Limited
Automotive Finance Limited
Ford Automotive Leasing Limited
Ford Motor Company Limited
Ford Personal Import Export Ltd.
Jaguar Cars Exports Limited
Jaguar Cars Limited
Jaguar Insurance Limited
Jaguar International Finance Ltd.
Jaguar Limited
Jaguar Sports Limited
Lagonda Properties Limited
The Jaguar Collection Limited
Venture Pressings Limited

Finland

Oy Ford Ab

France

Ford France S.A.
Ford New Holland S.A.

Germany

Ford Versorgungs-Und Unterstutzungseinrichtung GmbH

Holland

Ford Nederland B.V.

Mexico

Implementos Agricolas Mexicanos, S.A.
ACONA B.V.

New Zealand

Ford Motor Credit Company
of New Zealand Limited

Norway

Ford Motor Norge A.S.
Ford New Holland A/S

Philippines

Ford Philippines, Inc.

Puerto Rico

Puerto Ricancars, Incorporated

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag

Switzerland

Ford Credit S.A.

Taiwan

Ford Enterprise Company Taiwan, Ltd.
Ford Taiwan Services, Limited

Oy Ford Credit Rahoitus
Transcon Insurance Limited

APPENDIX H

The non-wholly owned subsidiaries of respondent General Motors Corporation are:

ACCSCO S.A. (Belgium)
ACE Limited (Cayman Islands)
AMBRAKE Corporation (USA)
AMRAAM International Licensing Company (USA)
AeroVironment, Inc. (USA)
Alliance Development Corporation (USA)
American Manufacturing Systems, Inc. (USA)
American Mobile Satellite Consortium, Inc. (USA)
Applied Intelligent Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
ARINC Incorporated (USA)
Asset Leasing GmbH (West Germany)
Atlantic Satellites Ltd. (Ireland)
Aura s.r.l. (Italy)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avicom International, Inc. (USA)
Banque de Credit General Motors (France)
Behaviortech, Inc. (USA)
Beijing International Information Processing Company Limited (Peoples Republic of China)
British Caledonian Flight Training Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)
CAMI Automotive, Inc. (Canada)
CEI Co., Ltd. (USA)
Calsonic Harrison Co., Ltd. (Japan)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (Federal Republic of Germany)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG (Federal Republic of Germany)
China Management Systems Corporation (China)
Cilva Holdings Plc. (England and Wales)
Cimflex Teknowledge (USA)

Coalition Undertaking Remedial Efforts, Inc. (USA)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Comtrac Corporation (USA)
Constructora Venezolana de Vehiculos, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)
DHB-Componentes Automotivos S.A. (Brazil)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Data Services America, Inc. (USA)
Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
Diavia s.p.A. (Italy)
EDESA Societe Anonyme Holding (Luxembourg)
E.D.S. Federal Services Corporation (USA)
E.D.S.W.-Mexico S.A. de C.V. (Mexico)
ELTRO GmbH (Federal Republic of Germany)
EPEC S.A. (Brazil)
Earth Observation Satellite Company (USA)
ELEKLUFT Elektronik-und Luftfahrtgerate GmbH (Federal Republic of Germany)
Empresa Mixta GEMACVEN, S.A. (Venezuela)
European Components Corporation (USA)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
Federal Integrated Systems Corporation (USA)
First City Corp. (USA)
G & F Company (USA)
GM Allison Japan Limited (Japan)
GMACC Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)
GMAC RF, Inc. (USA)
GMFanuc Robotics Canada Ltd. (Canada)
GMFanuc Robotics Corporation (USA)
GMFanuc Robotics Europe GmbH (West Germany)

GMFanuc Robotics Italia S.r.l. (Italy)
GMFanuc Robotics (U.K.) Ltd. (England)
GMFanuc Robotique France S.A.R.L. (France)
General Motors Bankgesellschaft m.b.H. (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Egypt (Arab Republic of Egypt)
General Motors France Automobiles S.A. (France)
General Motors Holdings (U.K.) Limited (England)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Republic of Zaire)
H & R Company (USA)
HBH Company (USA)
HKV (USA)
Hitachi Data Systems Holding Corporation (USA)
Hughes Data Systems (USA)
Hughes-Kenwood RDSS, Inc. (USA)
Hughes Microelectronics Europa Espana, S.A. (Spain)
Hughes Microelectronics Europa Limited (Scotland)
IBC Vehicles Limited (United Kingdom)
I.K. Coach Co., Limited (Japan)
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)
Ilmor Engineering, Inc. (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Infocel, Inc. (USA)
Interactive Entertainment, Inc. (Canada)
International Electro-Optical Industry Anonim Sirketi (Turkey)
Interpractice Systems, Inc. (USA)
Isuzu-General Motors Australia Limited (Australia)
Isuzu Motors Limited (Japan)
Japan Communications Satellite Company, Inc. (Japan)
Japan Satellite Communications Network Corporation (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
MET (USA)
Mecel AB (Sweden)
Metal Casting Technology, Inc. (USA)
Millbrook Pension Management Ltd. (England)
NCRS Holdings Inc. (USA)
National Car Rental Systems, Inc. (USA)
Neodata Holdings, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
New Venture Gear, Inc. (USA)
Nippon Avionics Co., Ltd. (Japan)
Nippon EDS Co., Ltd. (Japan)
ORRCO, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Opel-Automobilwerk Eisenach-PKW GmbH (Germany)
Opel-Handler Versicherungsdienst GmbH (Federal Republic of Germany)
Opel-Wohnbau GmbH (West Germany)
P.T. Mesin Isuzu Indonesia (Indonesia)
PDES, Inc. (USA)
Pacific Monolithics, Inc. (USA)
Packard CTA Pty. Ltd. (Australia)
Packard Electric Vas kft (Hungary)
Penske Transportation, Inc. (USA)
Perceptron (USA)
Promotora de Partes Electricos Automotrices (Mexico)
Rediffusion Simultation Tulsa, Inc. (USA)
Residential Funding Corporation (USA)
Robotic Vision Systems, Inc. (USA)
Ruedas de Aluminio, C.A. (Venezuela)
Saab Automobile AB (Sweden)
Senalizacion y Accessorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sociedad de Comercializacion Internacional Colmotores S.A. (Colombia)

Societe Francaise des Amortisseurs de Carbon S.A. (France)
Soft-Switch, Inc. (USA)
Subaru-Isuzu Automotive, Inc. (USA)
Sung San Company, Ltd. (South Korea)
Suzuki Motor Corporation (Japan)
Systems Technology Management Corporation (Korea)
T.A.D. Communications Company (USA)
T.A.D. Communications Company International (USA)
Tactical Truck Corporation (USA)
Telecommunications Data Service, Incorporated (USA)
Terminales Electricas, S.A. de C.V. (Mexico)
Thomas Group, Inc. (USA)
3DK Limited (United Kingdom)
Transallison S.A. (Brazil)
Truck and Bus Engineering U.K., Limited (USA)
UKADGE Systems Limited (United Kingdom)
Unitech, Inc. (USA)
United Australian Automotive Industries Limited (Australia)
United Motor Manufacturing, Inc. (USA)
Uveral S.A. (Uruguay)
Vanguarda Componentes Automotivas, S.A. (Brazil)
View Engineering, Inc. (USA)
Volvo GM Canada Heavy Truck Corporation (Canada)
Volvo GM Heavy Truck Corporation (USA)
Westcott Communications, Inc. (USA)

(2)

No. 90-1390

Supreme Court, U.S.
FILED
APR 18 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents,

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Michigan

---

BRIEF IN OPPOSITION FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

THEODORE SACHS
(Counsel of Record)
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

VIRGINIA A. SEITZ
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, DC 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTION PRESENTED

In 1980-1981, the Michigan Legislature passed statutes increasing workers' compensation benefits for workers iujured subsequently and permitting employers to offset other "employer financed" benefits against the workers' compensation benefits otherwise due and owing.

General Motors and Ford took the position that while these enactments did not increase the workers' compensation benefits payable to workers injured prior to 1982, the statutes did relieve the companies of the preexisting obligation to pay such workers the full amount of workers' compensation as originally established (by permitting the companies to make offsets for other "employer financed" benefits).

The companies' position in this regard was immediately—and with success—challenged administratively and in the lower state courts. Eventually, however, the Michican Supreme Court upheld the companies on statutory interpretation grounds; in so doing the Michigan Court agreed with General Motors that the adversely affected workers had no valid Contract Clause or Due Process Clause claim.

The 1987 Michigan Legislature responded by enacting a second—remedial and curative—statute requiring the companies to honor their workers' compensation benefits obligations incurred prior to 1982 according to the original terms.

The first question presented is

> whether the 1987 Michigan enactment violates the Constitution's Contract Clause.

The second question presented is

> whether the 1987 Michigan enactment violates the Due Process Clause.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
1. The 1981 Act	2
2. The Chambers Decision	4
3. The Reaction to the Chambers Decision	5
4. The 1987 Act	6
5. The Post-1987 Act Litigation	8
ARGUMENT	9
I. THE CONTRACT CLAUSE CLAIM	10
II. THE DUE PROCESS CLAUSE CLAIM	17
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 10, 13
Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (1986) 7
Chambers v. General Motors Corp., 1982 WCABO 751, lv den Mich. Ct. App. No. 67973 (April 25, 1983) 3
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15
Darr v. Mutual Life Insurance Co., 169 F.2d 262 (2d Cir. 1948) 21
Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983) 10, 11, 14, 18
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 15
Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 10, 17
Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959) 5, 16
Manigault v. Springs, 199 U.S. 473 (1905) 10
McKesson v. Div. of Alcoholic Beverages & Tobacco, —— U.S. ——, 110 S.Ct. 2238 (1990) 20, 21
Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237 (3d Cir. 1987) 16
Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) 18
Selk v. Detroit Plastic Products, 419 Mich. 1, 345 N.W.2d 184 (1984) 5
Franks v. White Pine Copper, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.*, 424 Mich. 1202, 389 N.W.2d 685 (1985) (the *Chambers* case) ..... *passim*
United States v. Sperry, —— U.S. ——, 110 S.Ct. 387 (1989) 18, 19
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 10, 14, 17
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 21
Welch v. Henry, 305 U.S. 134 (1938) 21

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTION — Page

Contract Clause ..... *passim*
Due Process Clause ..... *passim*

LEGISLATIVE MATERIALS

1980 PA 357 2
1981 PA 203 ..... *passim*
1987 PA 28 ..... *passim*
MCL 418.131 7
MCL 418.351 2
MCL 418.352(8) 3
MCL 418.352(10) 3
MCL 418.391 3
MSA 17.237(131) 7
MSA 17.237(351) 2
MSA 17.237(352(8) (10) 3
MSA 17.237(355) 2
MSA 17.237(391) 3

MISCELLANEOUS

Detroit Free Press, October 19, 1985 6
Detroit Free Press, November 3, 1985 6
Detroit Free Press, November 29, 1985 6
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) 13
LABORegister, June 1987 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents,

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Michigan

---

BRIEF IN OPPOSITION FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1 and 88a-92a of the petition for a writ of *certiorari* and the appendix thereto (hereinafter "Pet. ——" and "Pet. App. ——").

COUNTERSTATEMENT OF THE CASE

In this case, the Michigan Supreme Court upheld the constitutionality of a remedial and curative 1987 Michigan statute *restoring* the workers' compensation benefits of workers injured before 1982 to the levels that had obtained when those workers were originally awarded benefits; the original benefits had been reduced by certain employers who relied on a controversial reading of a 1981 amendment to the Michigan workers' compensation law and whose position was, after extensive litigation, upheld in a 1985 Michigan Supreme Court decision.

1. The 1981 Act

Respondent Evert Romein, in the course of his employment with General Motors Corporation, suffered disabling pelvic and hip injuries in a fall on December 5, 1977. General Motors did not dispute its liability under the Michigan workers' compensation law, and the company therefore commenced and continued statutorily required benefit payments to Mr. Romein in the amount of $99.00 per week.

Respondent Arturo Gonzalez, in the course of his employment with Ford Motor Company, contracted a disabling lung condition as a consequence of work-related foundry exposure. In September of 1981, Ford agreed to pay—and commenced payment of—workers' compensation benefits to Mr. Gonzalez in the amount of $176.00 per week.[1]

Under the Michigan law applicable at the time, General Motors' and Ford's obligation to make workers' compensation benefit payments to Messrs. Romein and Gonzalez in the amounts just stated was not limited by any employer right to reduce the agreed-on payment to take account of the injured workers' receipt of other employer-financed benefits payments.

After Messrs. Romein and Gonzalez began receiving the workers' compensation benefits just stated, the Michigan Legislature enacted a package of amendments to the State's compensation law. Insofar as relevant here, these amendments provided (1) a prospective improvement in the workers' compensation benefit rate for workers injured on or after January 1, 1982;[2] and (2) an employer right to reduce the amount paid in workers' com-

[1] Michigan's Silicosis, Dust Disease and Logging Industry Compensation Fund was obligated to reimburse Ford for all weekly benefits paid in excess of an aggregate $12,500.

[2] 1980 PA 357, § 1; MCL 418.351; MSA 17.237(351); MCL 418.355; MSA 17.237(355). (The "1980 Act".)

pensation to take account of (to "coordinate") certain other "employer-financed" benefits.[3] The 1980-81 legislative package did *not* provide the workers' compensation benefits payable to workers—such as Messrs. Romein and Gonzalez—injured before January 1, 1982.[4]

Nevertheless, General Motors and Ford, virtually alone among Michigan employers, contended that by reason of the 1981 Act, the workers' compensation benefits payable to workers who were injured prior to 1982 and who did *not* share in the 1982 improvements in benefit rates—were as subject to deduction of "employer-financed" benefits ("coordination") as were the workers' compensation benefits of those who did share in those improvements.

On this basis, General Motors and Ford unilaterally reduced the benefits of Messrs. Romein and Gonzalez and of other similarly situated workers, often to *zero*. In cases brought by these adversely-affected workers, the workers' compensation administrative agency consistently ruled against the employers. *See Chambers* v. *General Motors Corp.*, 1982 WCABO 751, lv den Mich. Ct. App. No. 67973 (April 25, 1983).[5]

[3] 1981 PA 203, effective March 31, 1982; MCL 418.354; MSA 17.237(354). (The "1981 Act".)

[4] Those injured prior to January 1, 1980 did receive a small state-financed—as opposed to employer-financed—supplement (MCL 418.352(8) (10); MSA 17.237(352)(8)(10); MCL 418.391; MSA 17.237(391).

[5] In September 1983, General Motors began retroactive "coordination" of Mr. Romein's workers' compensation benefits, based on his receipt of social security benefits and a pension. His workers' compensation benefits were reduced to *zero*. Romein filed a petition in November, 1983 with the Michigan Bureau of Worker's Compensation, objecting to the coordination. In June, 1984, an administrative law judge ordered that the payment of workers' compensation benefits be made without coordination.

In August, 1982, Ford "coordinated" Mr. Gonzalez' pension benefits against his workers' compensation benefits, reducing his workers' compensation benefits to *zero*. Gonzalez obtained a hearing before

In early 1982, the Michigan House and Senate each adopted a resolution declaring that the coordination of benefits provided for by the 1981 Act did *not* apply to workers injured before March 31, 1982, the effective date of the coordination provision.

As the Michigan Manufacturers Association acknowledged in its *amicus curiae* brief below (at p. 3):

> It was well known that the applicability of section 354 [of the 1981 Act] to claimants injured before March 31, 1982, was controversial. Those employers and carriers who began, prior to this court's [1985] decision in *Chambers*, to coordinate worker's compensation benefits with other employer-funded wage-replacement sources did so at their peril, and in the knowledge that litigation over the statute's applicability was pending.

2. The Chambers Decision

Eventually the Michigan Supreme Court concluded, as a matter of statutory construction, that, because the Michigan Legislature had not expressly stated otherwise, the 1981 Act permitted coordination of workers' compensation benefits regardless of the date of injury. *See Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W. 2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).[6]

---

the Bureau of Worker's Compensation. In October, 1984, an administrative law judge held that Ford had "improperly coordinated and reduced [the worker's compensation] benefits due and owing plaintiff." A $1500 penalty was also assessed.

Both decisions were appealed to the Workers' Compensation Appeals Board, and decided as described *infra*.

[6] The Michigan Court ruled in *Chambers* that since the 1982 resolutions passed by the Legislature (referred to in the text above) were not embodied in a statute signed by the Governor, those resolutions were not binding expressions of legislative intent. 422 Mich. 636, 659; 375 N.W.2d 715, 725.

In the *Chambers* litigation, the Michigan Court rejected the claimants' argument that to apply the 1981 coordination legislation to workers injured before its effective date would violate their alleged vested rights under the Contracts and Due Process Clauses of the Constitution. In that case, General Motors—taking a position diametrically opposite to the one asserted here—contended that those clauses and principles were inapplicable. See the Appendix hereto setting out the pertinent portion of General Motors' Brief in *Chambers*.[7] The Michigan Supreme Court, agreeing with General Motors, held that "[w]orkers' compensation benefits are social welfare income-maintenance benefits," which the State Legislature is free to change at will. 422 Mich. at 654, 375 N.W. 2d at 722. "In providing for such benefits, the Legislature did not covenant not to amend the legislation." 422 Mich. at 654, 375 N.W. 2d at 723.

3. The Reaction to the Chambers Decision

The *Chambers* decision generated immediate and strong reaction. Former Michigan Governor William Milliken, the sponsor of the 1981 Act (who is quoted approvingly at p. 3 of the *certiorari* petition), disavowed the Michigan Supreme Court's conclusion:

> It was our purpose, as my remarks quoted in the opinion indicated, to apply the concept of coordination of benefits but only to those persons who would under the new legislation be receiving improved bene-

---

[7] Citing *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W.2d 490 (1959); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W.2d 184 (1984), and other Michigan Supreme Court precedents, General Motors contended that "'no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law'" and that "'that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." Brief, p. 21.

> fit rates against which any set-offs of other benefits might occur. *It was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments.*[8]

This and other expressions of surprise and dismay followed.[9] Although the Michigan Supreme Court subsequently denied a motion to rehear *Chambers*, 424 Mich. 1202, 389 N.W. 2d 685, Justice Boyle, author of the original opinion, dissented, noting the "harsh and unforeseen consequences" of the Court's decision, and stating "The incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases," *id.*

4. The 1987 Act

Reaction to the Michigan Supreme Court's *Chambers* decision and to the decision's "harsh and unforeseen" consequences led to efforts for legislative relief. The State Legislature, with bipartisan—as well as business and labor—support, enacted, and the Governor approved, 1987 PA 28, immediately effective May 14, 1987 (the "1987 Act").[10] The 1987 Act—after declaring that "it having

[8] Letter to Theodore Sachs dated October 25, 1985, later published to the Michigan Supreme Court (emphasis supplied) and made part of the record below.

[9] Letter of James M. Brakora (Director of the Bureau of Worker's Disability at the time of the 1981 Act), Detroit Free Press, October 19, 1985; "Lawmakers contest court interpretation of worker's comp," Detroit Free Press, November 3, 1985; "Firms cut checks for disabled workers," Detroit Free Press, November 29, 1985; "Ruling on work disability pay stands," Detroit Free Press, December 31, 1985.

[10] Contrary to the statement in the *certiorari* petition that the 1987 Act resulted from a "changed economic and political environment, and with the sponsorship and support of organized labor" (p. 4), the Act was supported by both business and labor. Other amendments to the Act, including proposals favored by business, were also adopted. These included an amendment intended to mitigate the effect of the Michigan Court's then recent decision in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986), respecting the "intentional tort" exception to the exclusive-remedy provision of the Act. MCL 418.131; MSA 17.237(131).

> been and being the legislative intention not to coordinate payments . . . resulting from liability . . . for personal injuries occurring before March 31, 1982"—expressly prohibits the coordination of workers' compensation benefits for such injuries and requires refunds by employers and carriers of any coordination deductions that had been made. 1987 PA 28, § 345(17).

The then Director of the Bureau of Workers' Disability Compensation, Edward M. Welch, summarized the legislative history and purpose of the 1987 Act as follows:

> In 1982 the Legislature amended the law to provide that workers' compensation benefits would be reduced or "coordinated" for any other benefits which the worker received that were paid for by the employer. A dispute arose as to whether or not this applied to workers with dates of injury before the effective date of that law. In *Franks* v. *White Pine Copper Div.*, 422 Mich. 636 (1985) (frequently referred to as the *Chambers* case) the Supreme Court held that coordination did apply to all workers regardless of their injury date. Many people involved in the legislative process, including former Governor Milliken, expressed surprise at this decision and indicated that it had been their intention that coordination would apply only to workers injured after the effective date of the 1982 law.
>
> The new amendments to the Act correct this situation and make it clear that coordination only applies to workers injured after March 31, 1982. The amendments also call for a repayment to workers who have been coordinated in the meantime.[11]

[11] Michigan Department of Labor "LABORegister," June 1987, at 91.

5. The Post-1987 Act Litigation

General Motors and Ford subsequently contested the constitutionality of the 1987 Act in this and other litigation.[12] In so doing, General Motors and Ford argued, first, that the 1987 Act violated the *state* constitution's provisions concerning separation of powers in that the 1987 Legislature had improperly "overruled" the Michigan Supreme Court's 1985 *Chambers* decision; and, second, and contrary to General Motors' own prior position in the *Chambers* case, that the 1987 Act impaired the companies' vested rights, in purported violation of the Federal Constitution's Due Process and Contract Clauses.[13]

When the companies appealed to the Michigan Supreme Court, that court *unanimously* rejected their Con-

---

[12] General Motors and Ford, together with the Michigan Mutual Insurance Company, sued Edward M. Welch, Director of the Bureau of Workers' Compensation, Frank J. Kelley, Attorney General, and John H. Chambers, appellee in the *Chambers* case, to challenge the constitutionality of the 1987 Act. Ingham Circuit Court No. 87-59051 CZ (Hon. Peter D. Houk). The trial court upheld the constitutionality of the Act and dismissed the suit. The plaintiffs subsequently appealed to the Michigan Court of Appeals, No. 104980, which has stayed proceedings pending decision in the instant case.

[13] In the *Romein* case, the Worker's Compensation Appeal Board, on May 20, 1987, reversed the decision of the administrative law judge and held for General Motors. Romein filed an application for leave to appeal to the Michigan Court of Appeals.

In the *Gonzalez* case, the Appeal Board, on May 27, 1987, relying on 1987 PA 28, affirmed the decision of the administrative law judge that Ford must make the payment of workers' compensation benefits without reliance upon original § 354(1). Ford filed an application for leave to appeal to the Michigan Court of Appeals.

By orders dated September 4, 1987, the Michigan Court of Appeals granted review and consolidated the cases. Then, on May 16, 1988, the Court of Appeals reversed *Romein* and affirmed *Gonzalez* upholding the constitutionality of the 1987 Act. 168 Mich. App. 444, 425 N.W.2d 174 (1988).

tract Clause arguments. Justices Riley and Griffin dissented on the *state law* claim that the 1987 Act violated separation-of-powers principles; and Justice Griffin dissented on the Companies' federal Due Process Clause claim in an opinion relating that claim however to the state, separation-of-powers ground.

ARGUMENT

This litigation concerns two inherently inequitable and unreasonable claims put forward by the petitioners:

First, that while the Contract Clause is not offended when the Michigan Legislature passes a law that is given effect by the state courts so as to release employers of contractual obligations to their employees previously and solemnly undertaken, that Clause stands as an impenetrable barrier to curative action by the Legislature that restores the contractual *status quo ante*—and does so by going no further than to hold the employers to the promises made in their original contracts.

Second, that the Due Process Clause bars the enactment of a curative statute responding to an unexpected, and, in the Michigan Legislature's view, incorrect, judicial construction of an earlier statute, where the remedial statute does nothing more than to require that those who had undertaken a financial obligation prior to the initial enactment and who—in the face of a strong counterclaim that the earlier statute had no such purpose—took the position that the enactment released them of that obligation, must honor their original undertaking.

Not surprisingly, the Michigan Supreme Court rejected the contention that the Constitution's Contract and Due Process Clauses can be put to such obviously improper uses. In so doing the Michigan Court carefully and faithfully followed the principles established by this Court and continuously applied to cases such as this one.

Plainly then this is *not* a case that warrants this Court's review.

I. THE CONTRACT CLAUSE CLAIM

1. The Contract Clause principle that governs here is established beyond peradventure of doubt. Indeed, as Justice Stewart stated in the Court's opinion in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), the principle that "the Contract Clause does not operate to obliterate the police power of the States" is a "commonplace." That is so because

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. [438 U.S. at 241 quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905).]

The governing Contract Clause rules derived from this principle are both well-defined and clearly understood; those principles are deeply rooted in a long line of precedents that the Court synthesized and reaffirmed in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Allied Structural Steel, supra*, and *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983). *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 502-506 (1987) (summarizing and following *Energy Reserves Group* and the Contract Clause precedents cited there).

In deciding this case, the Michigan Supreme Court correctly understood that "[t]o test for the valid accommodation of the Contract Clause and the state's police power, the United States Supreme Court has established a three-pronged test." Pet. App. 15a. In Part IIA of the opinion in *Energy Reserves Group*, Justice Blackmun—speaking for a unanimous Court—set out that test. The first prong of the *Energy Reserves Group* mode of analysis is so much of the essence here that we quote it at length in the margin.[14]

In this regard, it is very much to the point that, as Justice Powell (with whom Chief Justice Burger and (then) Justice Rehnquist joined) emphasized in his concurring *Energy Reserves Group* opinion, there is "no substantial impairment of [a party's] contractual rights" where that party's "reasonable expectations have not been impaired by the [state legislation in question]." 459 U.S. at 421. And the conclusion that the state legislation in question does *not* work a substantial impairment is "dispositive" of the claim of a Contract Clause violation. *Id.*

2. In the instant case, the Michigan Supreme Court held the alleged "impairment" of contract rights "cannot be deemed a substantial one." Pet. App. 15a. That holding represents a careful and faithful application of this Court's *Energy Reserves Group* test.

The Michigan Court noted first that "employers benefit from [the workers' compensation] scheme by obtaining a

---

[14] The "threshold inquiry", said the Court, is

> "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U.S. at 244. *See United States Trust Co.* [*v. New Jersey*], 431 U.S. [1] at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel Co.*, 438 U.S. at 245. . . . In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. *Allied Structural Steel Co.*, 438 U.S. at 242, n.13, citing *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). [459 U.S. at 411.]

definite limit on their liability for workplace injuries. Since the impairment complained of in this case does not alter this basic benefit to the employer, it cannot be said to be substantial." Pet. App. 15a. The Michigan Court then added:

> The party to a contract who has entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation. *Energy Reserves Group, Inc., supra*, 459 U.S. at 411, 103 S.Ct. at 704, citing *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). The workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation. In this scheme the parties occupy a status that subjects them to certain retroactively imposed rights and liabilities. *Lahti*. The defendants knew that their rights were subject to alteration. In addition, the legislative resolution in early 1982 purporting to interpret § 354 put the defendants on notice that the Legislature might seek to prevent the coordination of benefits for pre-1982 injuries if efforts to achieve this result failed in the courts. Since the employer was aware of the likely alteration of the coordination of benefits provision, the impairment cannot be deemed substantial. [Pet. App. 15a-16a.]

If the Michigan Court is to be faulted in any respect, it is for giving the companies' arguments too much—not too little—credence. The Contract Clause claim made here is too paradoxical to be seriously entertained.

The 1977 "Romein-General Motors contract" and the 1981 "Gonzalez-Ford contract" each provide for the payment of a stated monthly workers' compensation benefit in addition to—and separate from—other "employer-financed" benefits.

Thereafter, the companies—*relying on a legislative enactment that become effective after these "contracts" were consummated*—impaired the "contracts" by reducing the agreed-upon payment to take account of certain other "employer-financed" benefits payable to Messrs. Romein and Gonzalez. The companies did so in the face of immediate legal challenges by the adversely affected employees, as well as actions by the Michigan Legislature and by the State Bureau of Workers' Compensation making it clear that the companies' aggressive use of the 1981 Act was legally questionable.

After the Michigan courts read the 1981 Act to authorize this impairment of these "contracts", the Michigan Legislature, in the 1987 Act, responded by making it crystal clear that the "contracts" are to be honored *according to their terms under the law as it stood at the time the "contracts" were negotiated and consummated and that contracting parties who sought to reap a windfall by dishonoring the "contracts" in the interim are to disgorge their improper gain.*

In *Allied Structural Steel*, the Court elaborated on the point of the Contract Clause by explaining: "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." 438 U.S. at 245. The 1987 Act cannot possibly be characterized as legislation that frustrates the companies' ordering of their business affairs by upsetting contract rights *on which the companies were entitled to rely.*

The salient point here, as thoughtfully explained in Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.Rev. 692, 720 (1960), cited at Pet. 27, is that "an act which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a

person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose" (discussing numerous cases).[15]

---

[15] Having correctly concluded that the 1987 Act did not substantially impair the companies' contractual rights, the Michigan Supreme Court need not have gone further. *See Energy Reserves Group*, 459 U.S. at 421 (Powell, J., concurring) quoted at p. 11, *supra*. But the Michigan Court also faithfully applied the second and third prongs of the *Energy Reserves Group* test, and held that the 1987 Act does not violate the Contract Clause even assuming that the Act substantially impairs the companies' contractual rights.

The second and third prongs of the *Energy Reserves Group* test require that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem;" and that the regulation make an "adjustment of 'the rights and responsibilities of contracting parties [based] upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption.'" 459 U.S. at 411-12 (citing *United States Trust Co.*, 431 U.S. at 22; *Allied Structural Steel Co.*, 438 U.S. at 247, 249).

As to the second prong of the *Energy Reserves Group* test, the Michigan Supreme Court correctly determined that the State Legislature's decision furthered a substantial and legitimate public purpose: *viz.*, the elimination of the coordination of benefits among employees who were injured before 1982 "since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." Pet. App. 17a. And, as to the third prong, the Michigan Court correctly determined that the 1987 Act was a reasonable means to achieve this purpose "since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Id.*

The Michigan Supreme Court's analysis accurately reflects this Court's admonition that

> the Contract Clause does not deprive the States of their "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co. v. New Jersey*, *supra* [431 U.S.] at 22. Thus . . . a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision

3. In what is nothing more than a red herring, the *certiorari* petition begins with a lengthy dissertation on the proposition that the "Michigan Supreme Court's initial conclusion—that there is no constitutionally protected contractual interest at stake here—is in direct conflict with a substantial line of federal and state precedents recognizing that the Contract Clause governs retroactive statutory modifications in the workers' compensation area." Pet. 11.

In Part II of its opinion, the Michigan Supreme Court unanimously rejected the companies' Contract Clause claim here on *two independent grounds*. Subpart IIA of the opinion—set out in two brief paragraphs—holds "that benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." Pet. App. 14a. In Subpart IIB—and after a full analysis—the Michigan Court "find[s] that 1987 P.A. 28 serves a legitimate state interest in protecting the benefits of disabled employees through reasonable means sufficient to survive a Contract Clause challenge." Pet. App. 17a.

This Court, of course, sits to review state court "judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). And, since, as we have shown, the Michigan Supreme Court's independent holding that the 1987 Act meets the Contract Clause's requirements is unassailable, the *certiorari* petition's claim of a conflict in the lower courts on the applicability of the Clause to such legislation is of no avail. If there is such a conflict, and if the companies' position on how that conflict should be resolved were sustained, that would return matters to a consideration of their Contract Clause claim on the merits; and,

---

for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917). [*Exxon Corp. Eagerton*, 462 U.S. 176, 191 (1983) (footnote omitted).]

as the Michigan Court correctly concluded, that claim is entirely without merit.[16]

4. The *certiorari* petition's Contract Clause discussion concludes with the modest proposal that the Court "reconsider the direction that the Contract Clause cases

[16] We believe that at the *certiorari* stage, the point made in the text is dispositive. So that we are not misunderstood, however, we add that the petitioners' "conflict" argument rests on a false premise: *viz.*, that all state workers' compensation laws create implied contractual rights between employers and employees.

We are not aware of any iron rule that the state statutes providing for workers' compensation benefits by their nature create implied contractual rights between employers and employees, and the petitioners cite no source establishing such a rule. Moreover, the question whether a State's workers' compensation statutes create such contract rights would not be a question of federal law but, rather, a question of state law which each State is free to answer for itself.

Thus, for example, in *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987), heavily relied on by petitioners, Pet. 11, the Third Circuit states that "contract terms *implied under state law* are protected by the Contract Clause;" and that workers' compensation laws are implied terms of employment contracts *in the Virgin Islands*. *Id.* at 1243-44 (emphasis supplied). Similarly, in the other cases that the petitioners cite for the proposition that workers' compensation laws create implied contractual rights, the state court is simply interpreting the State's laws.

Here, too, the Michigan Supreme Court made a determination based on state law and concluded that the Michigan workers' compensation scheme does *not* create implied contractual rights. Indeed, this is the Michigan Court's longstanding interpretation of the Michigan workers' compensation laws. *See, e.g., Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985); *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W.2d 490 (1959). And, as the petitioners recognize, other courts have reached this conclusion after examination of their state's workers' compensation schemes. *See* Pet. 13.

All this being so, the petitioners have *not* demonstrated a conflict in the lower courts on any point of constitutional law. Whether a State's workers' compensation scheme should create only statutory rights—or such rights *and* implied contractual rights as well—is a matter of state law about which the states are free to differ.

have taken" in order to "restore the Clause to its proper place in the constitutional scheme." Pet. 21.

The petition is, to be sure, less than precise in setting the metes and bounds of that "proper place."[17] In particular, the petition provides only the airiest generalities regarding what this new Contract Clause jurisprudence would be and makes no effort whatsoever to show that this jurisprudence would require reversal of the decision below *in this case*.[18]

With all deference, we suggest that the foregoing is worlds away from a demonstration that the governing Contract Clause principles so thoroughly and so recently stated in the Court's decisions from *United States Trust* through *Keystone Bituminous Coal Assn.* require reconsideration. What this portion of the petition does underline—inadvertently, we are sure—is the woeful weakness of the petitioners' Contract Clause claim.

II. THE DUE PROCESS CLAUSE CLAIM

The Companies' Due Process Clause claim—that the 1987 Act's retroactive effect transgresses constitutional norms—is nothing but their Contract Clause claim rephrased. This Court has "contrasted the limitations im-

[17] We are told only that the Clause "was construed as a virtually absolute bar on retroactive impairments of contractual obligations", that *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), "modified this approach" albeit only as "a limited departure", and that later cases have "expanded the exception". Pet. 21-22. This short history of the law is then supplemented by a 1965 dissenting opinion by Justice Black, a 1987 Seventh Circuit concurring opinion by Judges Posner and Easterbrook, and a single law review article of the same year as the "proof" that this Court's Contract Clause jurisprudence has gone astray. Pet. 22-23.

[18] This section of the petition ends with a clarion call to "reconsider" the "dichotomy" between "public and private contracts" and with regard to the latter, to require that "any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was 'essential to the achievement of an important state purpose.'" Pet. 23 (quoting *United States Trust*, 431 U.S. at 32 (Burger, C.J., concurring)).

posed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses." *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 733 (1984). Against that background, it follows from what we have shown thus far that the Michigan Supreme Court's rejection of this Due Process Clause claim is entirely sound and we therefore make only two additional points.

1. Just as the governing Contract Clause law was clearly stated by a unanimous Court in *Energy Reserves Group, supra*, so the governing Due Process Clause law was clearly stated by a unanimous Court in *Pension Benefit Guaranty Corp.* The essence of the matter is that

> the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . .
>
> To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose. [467 U.S. 729, 730.]

See also United States v. Sperry, —— U.S. ——, 110 S.Ct. 387, 396 (1989) (unanimously reffirming the standard for review of retroactive legislation stated in *Pension Benefit Guaranty Corp.*).

2. The Michigan Supreme Court explained at length why the 1987 Act meets that deferential rationality standard. That court stated first:

> The justification for retrospective legislation must take into account the possibilities that the parties

> acted in reliance on current law and that they may have altered their conduct to reduce liability if they had anticipated the imposition of later liability.
>
> It is . . . unlikely that the defendants in this case would have altered their course of conduct and paid full benefits merely to avoid the potential liability from a later change in the law. The employers acted in their own best economic interests at the time. [Pet. App. 7a-8a.][19]

The Michigan Court added:

> The retroactive portions of the statute challenged here are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed. These amendments served a rational legislative purpose to alleviate this hardship. [Pet. App. 9a.]

It is equally to the point that the Michigan Court was

> not persuaded that the defendants' reliance on the coordination provisions was reasonable.
>
> The defendants cannot claim a reliance interest on rights created by the workers' compensation statute that are more deserving of constitutional protection than the reliance interest of the employers who incurred retroactive liabilities under the pension law upheld in *Pension Benefit Guaranty Corp., supra*, 467 U.S. at 727, 104 S.Ct. at 2716. In both instances, the employers were on notice of the legislative debate regarding the proposed changes in the law. Reliance on an area of law that is in a state of flux is not reasonable reliance. [Pet. App. 11a-12a.]

In short, as we have already emphasized, General Motors and Ford sought to take advantage of a drafting defect in a statutory enactment to relieve themselves of a *pre-existing* financial obligation. The companies, more-

---

[19] *Cf. United States v. Sperry, supra*, 110 S.Ct. at 396 ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them").

over, did so in the face of an immediate litigation challenge and a contemporaneous legislative statement that their reading of the statute was wrong. After the protracted litigation that ensued eventuated in a decision that the Michigan Legislature determined was contrary to its original intent and to a proper distribution of the benefits and burdens of economic life, the Legislature took action limited to assuring that the companies did not enjoy a windfall and that the workers injured before the 1981 Act became effective received the amount of workers' compensation benefits those workers had been promised at the time of their injury.[20]

The companies' Due Process Clause argument begins from the proposition that the Michigan Supreme Court "failed to give effect to this Court's repeated admonition that the Due Process Clause is particularly concerned with retroactive enactments that disturb past transactions and reasonable expectations." Pet. 24. The foregoing, we submit, is more than sufficient to demonstrate that the 1987 Michigan Legislature acted properly precisely because neither General Motors nor Ford had any basis for a "reasonable expectation" that the 1981 Act completely and finally wiped away the workers' compensation benefit obligations the companies had previously incurred.[21]

---

[20] The petitioners' repeated invocations of *McKesson v. Div. of Alcoholic Beverages & Tobacco*, —— U.S. ——, 110 S.Ct. 2238 (1990), Pet. 26, 28, are puzzling to say the least. In *McKesson*, this Court all but suggests that Florida cure the unlawful discriminatory effect of a tax by "assess[ing] and collect[ing] back taxes from petitioner's competitors who benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." 110 S.Ct. at 2252.

[21] Citing cases involving the retroactive imposition of tax liability—an area that is *sui generis*—the petitioners argue that while the statutory imposition of some period of retroactivity might not offend the Due Process Clause, five years of retroactivity is unlawful. Pet. 24, 28-30. This contention is baseless.

Even when retroactive liability for taxes is imposed, this Court has not adopted a temporal limit on retroactivity. Instead, the Court has said, "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation,' *depending on 'the nature of the tax and the circumstances in which it is laid.'*" *McKesson v. Div. of Alcoholic Beverages & Tobacco, supra*, 110 S.Ct. at 2252 n.23 (1989) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)) (emphasis supplied). We have already shown that, under the circumstances presented here, the imposition upon the petitioners of remedial liability to workers injured before 1982, far from being "harsh" or "oppressive", was entirely foreseeable and is eminently just.

This same inquiry, involving a consideration of all the facts and circumstances, is also appropriate outside the taxation area. Thus, for example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-20 (1976), this Court approved the statutory imposition upon employers of retroactive liability for the effects of deaths and disabilities of miners who left employment in the industry before the effective date of the Act; as the Michigan Supreme Court noted, *Turner Elkhorn* did so despite the fact that "liability for past, completed transactions was altered," Pet. App. 11a.

Similarly, Due Process challenges to the constitutionality of the Portal to Portal Act of 1947, enacted *nine years* after the Fair Labor Standards Act, were uniformly rejected despite the fact that the 1947 statute retroactively "obliterated causes of action for overtime pay, liquidated damages and counsel fees, which had accrued under the Fair Labor Standards Act previous to the enactment of the Portal to Portal Act." *Darr v. Mutual Life Insurance Co.*, 169 F.2d 262, 266 (2d Cir. 1948).

CONCLUSION

For the above-stated reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

THEODORE SACHS
(Counsel of Record)
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

VIRGINIA A. SEITZ
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, DC 20006

APPENDIX

APPENDIX

Point III of the Argument In the Brief For General Motors To The Michigan Supreme Court In *Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.* 424 Mich 1202, 389 N.W. 2d 685 (1985).

III.

Section 354 does not deprive any person of a vested or contractual right.

The Board also erred by concluding that application of § 354 would violate rules of statutory construction which prohibit retrospective application of statutes to take away or impair vested rights. App, pp 34a-36a. The Board's conclusion in that respect erroneously assumes that there exists a vested right to worker's compensation benefits. *Lahti* v *Fosterling*, 357 Mich 578 (1959), teaches otherwise.

In *Lahti* this Court was confronted with a claim by the plaintiff for additional medical benefits based upon an amendment to the Act which became effective after his injury. The statute in force on the date of plaintiff's injury required the employer to pay the expense of hospitalization and medical care for a maximum of four 6 month periods from the date of injury. Subsequent to the plaintiff's injury, the Act was amended to give the Bureau discretion to order unlimited additional 6 month periods of medical and hospital care to be paid by the employer. The employer contended that the right to compensation vested at the time the employee's cause of action accrued because the right to compensation arose out of an employment contract and that subsequent amendments could not modify the employee's rights or the employer's obligations.

However, this Court in *Lahti* rejected the defendant's argument and held that:

> "* * * no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law * * *." 357 Mich 578, 595.

The basis for this conclusion is that worker's compensation remedies exist as a matter of legislative grace and:

> "* * * that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." 357 Mich 578, 589.

Those principles, as enunciated in *Lahti*, were recently reaffirmed in *Selk*, *supra*. In *Selk*, as in *Lahti*, the employers argued that "'since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract'." 419 Mich 1, 11. As in *Lahti*, the court in *Selk* rejected that conclusion, citing *Lahti* and *McAvoy* v *H. B. Sherman Co.*, 401 Mich 419 (1977):

> "'"* * * But we cannot say that such contractual relationship or liability necessarily precludes a subsequent Legislature from effecting changes in the Workmen's Compensation laws. Those who enter into such contractual relationships do so with knowledge of the right and power of the Legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change."'" *Lahti*, 357 Mich 578, 594-595, quoted in *Selk*, 419 Mich 1, 12.

* * *

> "* * * 'remedies for the enforcement of a contract may be modified without violating the impairment of contract clauses'." *McAvoy*, 401 Mich 419, 457, quoted in Selk, 419 Mich 1, 12.

After discussing *Lahti* and *McAvoy*, this Court in *Selk* concluded:

> "* * * The state may, however, alter the terms of a private contract *to either lighten or increase obligations*, save where its activities constitute a substantial alteration of the terms of a contract. In the latter event, the alteration is permissible if the legislation is necessary to meet a broad and pressing social need and is reasonably related to that goal. *Allied Structural Steel Co* v *Spannaus*, 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978)." 419 Mich 1, 13. Emphasis added.

Here, the obligation of an employer remains to provide payments which equal the amount of worker's compensation awarded to the employee. What is changed is the sources from which the obligation may be met. See *Alessi*, *supra*, p 7, footnote. If the employee is receiving no pension or other employer-financed benefits, the entire obligation must be met out of worker's compensation funds provided by the employer through either self-insurance or commercial insurance. Insofar as other employer-financed benefits are available, they may be used to meet the obligation.

Should such employer-financed benefits cease, then the employer again must meet the full obligation from its own or its insurer's resources. By that means, the Legislature has insured that an injured employee always will receive that level of compensation which the Legislature has determined is necessary during the continuance of disability. Thus, if an employee's worker's compensation were coordinated because of receipt of social security benefits or a pension, he or she still would continue to re-

ceive at least the level of income the Legislature has determined is appropriate. Should social security payments diminish or cease, the employer still would have to provide payments sufficient to meet the level of worker's compensation established by statute. The same would hold true if for some reason the assets of a pension plan became insufficient to meet pension obligations.

Moreover, even if there were a substantial alteration of plaintiff's right to receive a specified sum as the result of injury, which is not the case, *Selk* observes that such an alternation would be appropriate to remedy a serious social problem in the field of worker's compensation when the legislative solution is reasonably related to that problem. Like § 801, which was part of the reform package and the validity of which was recognized in *Selk*, § 354 also was part of the legislative solution to a perceived problem. The wisdom of that solution:

> "'* * * is, in any event, a matter confined to the exclusive judgment of the Legislature. * * *'" 419 Mich 1, 14.

Having determined that application of a 12% interest rate to payments accruing and relating to injuries occurring before the effective date of § 801 did not impair the obligation of contracts, this Court in *Selk* rejected the claim that to do so was violative of substantive due process:

> "Having found that the statute is reasonably related to a legitimate state interest for purposes of the impairment of contract claim, we conclude that defendants' due process claim is likewise without merit. In *Lahti* v *Fosterling, supra*, 357 Mich 591-592, we quoted from *Matter of Hogan* v *Lawlor & Cavanaugh Co*, 286 App Div 600; 146 NYS2d 119 (1955), in holding:
>
> > "'"The due process clause of the State and Federal Constitutions does not freeze the burden of

> > compensation liability as of the date of the occurrence of an industrial accident, beyond the power of legislative change. In carrying out its social purpose, the Legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."'" 419 Mich 1, 14-15.

As the Court earlier noted in *Selk*, quoted *supra*, p 22, the State may by amendment either "lighten or increase" obligations and, as the language just quoted establishes, that may be done "even though the accident which gave rise to the disability or expenses had occurred prior to [enactment of the amendment]." Under § 354, the employer's obligation was unchanged, only the method of fulfilling it having been modified, but even if it were otherwise, *Selk* establishes that the result would be permissible.

A similar situation was presented in *In re: Certified Questions, Karl* v *Bryant Air Conditioning Co.*, 416 Mich 558 (1982), in which the application of the comparative negligence statute to a plaintiff whose cause of action had accrued and whose case was pending prior to enactment of the statute "reduced plaintiff's damages by the corresponding amount that plaintiff was negligent, which was 95% of the total." 416 Mich 558, 562. The Court in *Karl* explained why this very significant alteration in the amount of plaintiff's recovery was not an impermissible result:

> "Comparison of 'rule three cases' [which involve 'vested' rights] to the instant case indicates that application of the products liability statute did not trigger the proscription found in rule three. First, the statute did not interfere with plaintiff's 'contractual cause of action' since an implied warranty

action for personal injuries caused by a defective product is different from an express contract. Second, this rule is also triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act. While the total damages which plaintiff could have received were significantly reduced by § 2949, plaintiff's cause of action was not legally barred or taken away.

"Section 2949 does not bar any claim, legal or equitable, but it states that 'damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.' See, also, *Li* v *Yellow Cab Co of California*, 13 Cal 3d 804, 828-829; 119 Cal Rptr 858, 875; 532 P2d 1226, 1243 (1975). Section 2949 is not a legal bar, but is a principle established by the Legislature which mitigates damages in products liability actions." 416 Mich 558, 577.

As in *Karl*, so here, plaintiff's right is not "barred or taken away"; instead, worker's compensation benefits paid directly to the worker may be diminished, but only for so long as and to the extent that other payments financed by the employer are received by the worker.

(5)

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1390
SUPREME COURT
OF THE UNITED STATES
October Term, 1990

GENERAL MOTORS CORPORATION,
Petitioner,

v

EVERT ROMEIN and MICHIGAN
ATTORNEY GENERAL FRANK J. KELLEY,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v

ARTURO GONZALEZ and MICHIGAN
ATTORNEY GENERAL FRANK J. KELLEY,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Michigan

BRIEF FOR RESPONDENT MICHIGAN ATTORNEY GENERAL IN OPPOSITION

FRANK J. KELLEY
Attorney General

GAY SECOR HARDY
Solicitor General

THOMAS L. CASEY
Assistant Solicitor General
Counsel of Record
Appellate Division
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

QUESTIONS PRESENTED

I

WHETHER A 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF WORKERS' COMPENSATION BENEFITS DUE AND PAYABLE PRIOR TO THE AMENDMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

WHETHER A 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF WORKERS' COMPENSATION BENEFITS DUE AND PAYABLE PRIOR TO THE AMENDMENT VIOLATES THE IMPAIRMENT OF CONTRACTS CLAUSE (ART I, § 10) OF THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

THE 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF WORKERS' COMPENSATION BENEFITS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 5

THE 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF BENEFITS DUE AND PAYABLE PRIOR TO THE AMENDMENT DOES NOT VIOLATE THE IMPAIRMENT OF CONTRACTS CLAUSE (ART I, § 10) OF THE UNITED STATES CONSTITUTION 12

CONCLUSION 19

TABLE OF AUTHORITIES

Pages

Cases

Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400 (1983) 13,18

Exxon Corp v Eagerton, 462 US 176 (1983) 13,18

Franks v White Pine Copper Div., 122 Mich App 177 (1982) 3

Franks v White Pine Copper Div., 422 Mich 636 (1985), reh den 424 Mich 1202 (1985) 3,8,9

Home Building & Loan Assn v Blaisdell, 290 US 398 (1934) 18

Pension Benefit Guaranty Corp v Gray and Co, 467 US 717 (1984)...passim

Railroad Retirement Board v Alton R Co, 295 US 330 (1935) 9,10

Usery v Turner Elkhorn Mining Co, 428 US 1 (1976) .....passim

Constitution

US Const, Art I, § 10 .....passim

Other Source

Stern, Gressman & Shapiro, Supreme Court Practice, 6th Edition, § 4.4, p 200 (1986) 13

STATEMENT OF THE CASE

Respondent Michigan Attorney General agrees with and adopts the "Counterstatement of the Case" contained in the Brief in Opposition to the Petition filed by Respondents Romein and Gonzalez, but wishes to emphasize the following points:

1. Michigan law did not permit "coordination" of employer-provided benefits (i.e., reduction of workers' compensation benefits) prior to a package of statutory changes in 1980-1981.

2. Those amendments prospectively increased the employer-financed workers' compensation benefit rates for workers injured after January 1, 1982, but did not increase the employer-financed workers' compensation benefits payable to workers injured before January 1, 1982, although there was some state-financed

increase. Effective March 31, 1982, the amendments permitted employers to reduce the amounts paid as workers' compensation benefits to take account of other employer-financed benefits (i.e., permitted "coordination" of benefits).

3. Although the statute was silent on the question, a few employers--notably Petitioners General Motors and Ford--applied the "coordination" provision to workers injured prior to 1982 as well as to workers injured after 1982. Petitioners did so at their peril, knowing full well that such action was hotly contested. Petitioners' interpretation of retroactive application was disputed by a non-binding resolution of the Michigan legislature in 1982 and was rejected in administrative hearings and

by the Michigan Court of Appeals, Franks v White Pine Copper Div., 122 Mich App 177 (1982). Not until October 7, 1985, was Petitioners' position upheld, Franks v White Pine Copper Div., 422 Mich 636 (1985), reh den 424 Mich 1202 (1985). In companion litigation which was consolidated in the Michigan Supreme Court's decision in Franks, workers injured before 1982 argued that to apply the "coordination" provisions retroactively to them would violate the Due Process Clause and the Contracts Clause of the United States Constitution. Interestingly, Petitioner General Motors took a position diametrically opposed to their position in the instant case and argued that there was no constitutional violation.

4. Effective May 14, 1987, the Michigan legislature enacted the statute at issue in the instant case which prohibits "coordination" of benefits for injuries occurring prior to March 31, 1982, and which required refunds if "coordination" deductions had been made.

REASONS FOR DENYING THE WRIT

The constitutional principles which govern this case are clear. The frameworks for analysis of Petitioners' Due Process Clause and Contracts Clause claims have been fully and carefully explicated in consistent decisions by this Court and were correctly applied by the Michigan Supreme Court. Petitioners' assertions of confusion and conflict are overstated, and there is nothing about this case which calls for re-examination of those principles by this Court.

THE 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF WORKERS' COMPENSATION BENEFITS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The standards to be used in evaluating a due process challenge to retro-

active legislation have been clearly enunciated in several decisions of this Court, particularly in Usery v Turner Elkhorn Mining Co, 428 US 1 (1976), and Pension Benefit Guaranty Corp v Gray and Co, 467 US 717 (1984). In Usery, supra, 428 US at 15-17, the Court said:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. ***
>
> " *** But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *** This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. ***
>
> "It does not follow however that what Congress can legislate prospectively it can legislate retrospectively.
>
> "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."

In Pension Benefit Guaranty Corp, supra, 467 US at 728-730, the Court quoted with approval from Usery and went on to say, "But that burden [of justifying retroactive legislation] is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."

Petitioners' allegation, Petition page 24, that the Michigan Supreme Court's decision imposes "five years of retroactive monetary liability" significantly overstates the facts. It must be recalled that although Petitioners unilaterally chose to impose retroactive

"coordination" of workers' compensation benefits in 1982, they did so at their peril and their interpretation of the statute was uniformly rejected by administrative tribunals and the Michigan courts until December 30, 1985, when the Michigan Supreme Court decision in Franks, supra, and its companion cases became final after rehearing was denied. Respondent Attorney General submits, therefore, that the period of retroactive application should more appropriately be viewed at most as approximately one and one-half years: The period from the date the Michigan Supreme Court decisions in Franks became final (December 7, 1985) until the effective date of the challenged statute (May 14, 1987), during which time legislative efforts were pending to address the consequences of the

Franks decision. The outcome of the instant case is heavily dependent upon its own unique facts and, contrary to the statement on page 29 of the Petition, there is simply nothing in the Michigan Supreme Court's decision which indicates any "endorsement of open-ended retroactive liability."

Despite Petitioners' contention that the Michigan Supreme Court engaged in only "the most minimal scrutiny", Petition, page 24, it is clear from the decision that the Michigan Supreme Court did in fact carefully follow the principles of Usery and Pension Benefit Guaranty Corp in evaluating Petitioners' due process claim. Petitioners' reliance on Railroad Retirement Board v Alton R Co, 295 US 330 (1935), is misplaced.

Even assuming that Alton retains vitality ("despite the changes in judicial review of economic legislation that have occurred in the ensuing years", Pension Benefit Guaranty Corp, supra, 467 US at 733), it is clearly distinguishable. Just as this Court said that Alton did not control in the context of black lung benefit provisions in Usery, so, too, in the instant case, the Michigan workers' compensation benefits are not intended to meet an employee's "generalized need for funds", but instead are "to satisfy a specific need created by the dangerous conditions under which the former employee labored--to allocate to the [employer] an actual, measurable cost of his business." Usery, supra, 428 US at 19.

Contrary to the suggestion on pages 26-28 of the Petition, there is nothing in this Court's decision in Pension Benefit Guaranty Corp which suggests a retreat from the principles of Usery. Because the appropriate legal analysis employs terms such as "arbitrary" and "rational", it is true that this Court's decisions have not set forth a "black letter" rule describing with specificity the outermost reaches of constitutionality. Nevertheless, despite the fact that there is some necessary flexibility in the standard, Petitioners are simply wrong when they assert that this Court's opinions have resulted in "vagueness and confusion" which has left the lower courts "without meaningful guidance." Furthermore, examination of the Michigan Supreme Court's opinion

clearly reveals that the court did consider "other equitable factors", Petition page 26, such as reliance on prior law and the question whether Petitioners had any vested rights. The Michigan Supreme Court correctly concluded, on the unique facts of the instant case, that Petitioners did not justifiably rely on prior law and that the statute did not violate any vested rights.

THE 1987 MICHIGAN STATUTE RETROACTIVELY RESTORING THE LEVEL OF BENEFITS DUE AND PAYABLE PRIOR TO THE AMENDMENT DOES NOT VIOLATE THE IMPAIRMENT OF CONTRACTS CLAUSE (ART I, § 10) OF THE UNITED STATES CONSTITUTION.

The Michigan Supreme Court correctly held that Michigan law clearly provides that employers such as Petitioners cannot rely on the level of benefits existing at the time of an injury as a legitimate

contractual expectation. App. to Petition 14a. Because there is no contract, Michigan's workers' compensation statutes do not create rights protected by the Contract Clause.

Petitioners assert, Petition pages 13-14, that state courts around the country have disagreed on the question whether the Contract Clause governs retroactive legislation in the workers' compensation area. Respondent Attorney General submits that this issue involves questions of state law, but to the extent that a question of federal law is present, Petitioners have not demonstrated that such a conflict, if it in fact exists, is intolerable. In Stern, Gressman & Shapiro, Supreme Court Practice, 6th Edition, § 4.4, p 200

(1986), the authors cite Justices Stevens and Marshall in discussing the policy of letting "tolerable conflicts go unaddressed" since such conflicts may play a constructive role in the lawmaking process by helping to illuminate issues and to examine the results of experimentation with substantive and procedural solutions to the problem. In the instant case, Petitioners cannot claim to have been harmed by the Michigan Supreme Court's conclusion that workers compensation matters are not subject to the Contract Clause, because the court went on to evaluate, and reject, their claims using the proper Contract Clause analysis. Furthermore, Respondent Attorney General submits that the instant case is not an appropriate one for the Court to utilize in resolving any

conflict, since it is tied so closely to its own unique facts, particularly the unique chronology of the various statutory enactments and state court decisions.

Respondent Attorney General submits that even if the Contract Clause applies in the instant case, there has been no violation. As the Michigan Supreme Court correctly recognized, App. to Petition 15a, the constitutional prohibition against impairing the obligation of contract must be "accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.'" Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400, 410 (1983). Even more explicitly, this Court in Exxon Corp v Eagerton, 462 US 176, 190-191 (1983), said:

"The Contract Clause does not deprive the States of their 'broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.' *** Thus, ... a workmens' compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, New York Central R Co v White, 243 US 188, 61 L Ed 667, 37 S Ct 247 (1917)."
(Citations and footnote omitted).

The Michigan Supreme Court evaluated Petitioners' Contract Clause claim using the balancing test which weighs the substantiality of the impairment, the legitimacy of the public purpose for the impairment and the reasonableness of the means chosen to serve that purpose. App. to Petition 15a-17a. Respondent Attorney General suggests that, in the unique circumstances of the instant case, the Michigan Supreme Court's evaluation of those factors was correct.

Although Petitioners apparently agree that the Michigan Supreme Court applied the correct balancing test (although they disagree with the court's resolution of their claims), Petitioners' principal Contract Clause argument in the instant case urges this Court to engage in a dramatic reevaluation of the fundamental meaning of the Contract Clause itself. They suggest that the Court's recent cases have resulted in a test which is unfaithful to the language and purpose of the Contract Clause and that the Court's decisions have somehow moved the Contract Clause from its "constitutional moorings." Respondent Attorney General submits that while it is true that interpretation of the Contract Clause has evolved over the decades since enactment of the Constitution, there is simply no

legitimate reason to retreat from current Contract Clause jurisprudence. Under the modern decisions, (i.e., since Home Building & Loan Assn v Blaisdell, 290 US 398 (1934)), although the language of the Contract Clause is facially absolute, "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Exxon Corp, supra, 462 US at 190 (unanimous decision), quoting Energy Reserves Group, Inc, supra, 459 US at 410, and Home Building & Loan Assn, supra, 290 US at 434. Respondent Attorney General submits that, particularly within the context of the unique facts of the instant case, this interpretation of the Contract Clause is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
State of Michigan

GAY SECOR HARDY
Solicitor General

THOMAS L. CASEY
Assistant Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

April 19, 1991

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

(8)

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

REPLY BRIEF FOR PETITIONERS

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

JACK F. WHEATLEY
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
I.	THE APPLICABILITY OF THE CONTRACT CLAUSE	2
II.	THE REQUIREMENTS OF THE CONTRACT CLAUSE	4
III.	THE REQUIREMENTS OF THE DUE PROCESS CLAUSE	7
	CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	1
Chambers v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985)	5, 6, 8, 9
Coombes v. *Getz*, 285 U.S. 434 (1932)	3
Franks v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985)	5, 6, 8, 9
Irving Trust Co. v. *Day*, 314 U.S. 556 (1942)	3
Pineman v. *Oechslin*, 637 F.2d 601 (2d Cir. 1981)	3, 4
State of Nevada Employees Ass'n v. *Keating*, 903 F.2d 1223 (9th Cir.), cert. denied, 111 S. Ct. 558 (1990)	4
MISCELLANEOUS:	
4 *Larson's Workmen's Compensation Law* (1989)	1

REPLY BRIEF FOR PETITIONERS

Respondents have not refuted petitioners' description of the confusing state of the law with respect to Contract Clause and Due Process limitations on retroactive legislation. Rather they have sought to persuade the Court that the facts of this case are so unique that the Court need not bother paying attention to the Michigan Supreme Court's decision.[1] The facts of this case are indeed somewhat unique—never before has a court upheld a legislature's massive imposition of retroactive liability designed solely to reverse an earlier (now politically unpopular) legislature's enactment. But the extreme character of the Michigan court's decision does not make this case any less appropriate a candidate for certiorari; for the Contract Clause and Due Process issues that the Michigan court decided are recurring ones that continue to confuse and divide the many lower courts that address them.

The Michigan Supreme Court's decision cannot be shrugged off as an aberration; it is a typical example of the cavalier manner in which some courts have treated the bedrock prohibitions against impairments of contract and retroactive legislation. By granting certiorari in this case, the Court will not only be able to settle a number of important conflicts among the lower courts, but will also have the opportunity to remind the courts and legis-

[1] In light of respondents' efforts to portray coordination as some draconian measure that deprives employees of their entitlements, it is worth noting that respondents continue to receive their income-replacement benefits from petitioners; all they are being deprived of is their right to double recovery. The principle of coordination is the approach endorsed by the National Commission on State Workmen's Compensation Laws. See 4 *Larson's Workmen's Compensation Law* app. G 607, 616 (1989); see also 4 *Larson's Workmen's Compensation Law* § 97.10 (an employee experiencing wage-loss due to three separate conditions—physical disability, economic unemployment, and old age—is still only experiencing one wage-loss and should not be allowed to recover three sets of benefits simultaneously); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (ERISA preempts state laws prohibiting coordination of benefits).

latures of the nation that the Contract Clause and Due Process Clause are not dead letters, and that distinct limitations on retroactive legislation—limitations that the Framers of the Constitution thought to be of paramount significance in the constitutional scheme—continue to exist.

I. THE APPLICABILITY OF THE CONTRACT CLAUSE

Respondents do not dispute the fact that state and federal courts throughout the country have reached dramatically divergent results on the question of whether workers' compensation schemes create rights protected by the Contract Clause. Instead, they first assert that this issue is inappropriate for review because the Michigan Supreme Court's holding on this point was an alternative one. Romein Opp. 15. But far from making this an inappropriate decision for this Court to review, the fact that the Michigan Supreme Court also held, in the alternative, that the 1987 statute could withstand Contract Clause scrutiny strongly supports a grant of certiorari. As petitioners have demonstrated, both of the issues presented here—the applicability of the Contract Clause to workers' compensation schemes and the proper application of this Court's Contract Clause cases to retroactive impairments of private agreements—cry out for this Court's review. The Michigan Supreme Court's dual holdings will give this Court the opportunity to address both of these issues, each of which is independently worthy of review.[2]

[2] Of course, if the Court, upon granting review, were to hold that the Contract Clause does not apply to workers' compensation schemes, it would have no need to go on to address the proper application of the Contract Clause (although the Due Process issue would remain alive). But, even in that unlikely event, the Court will have settled a conflict that has created a substantial split among many federal and state courts. Alternatively, if the Court were to hold that the Contract Clause does apply, it would then have the opportunity to review the Michigan Court's erroneous application of that Clause.

Respondents' second contention is that the question of whether a State's workers' compensation statute creates interests protected under the Contract Clause is not a question of federal law, "but, rather, a question of state law which each State is free to answer for itself." Romein Opp. 16 n.16; see also State Opp. 13-15. This claim, for which respondents offer no support, is blatantly inconsistent with what this Court and the lower federal courts have continuously declared about the Contract Clause: "[the Supreme] Court has frequently instructed that *federal courts must independently determine* the existence of a contract and the nature and extent of its obligations in order to decide whether it enjoys the protection of the Contract Clause." *Pineman* v. *Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981) (emphasis added). In *Coombes* v. *Getz*, 285 U.S. 434, 441 (1932), for example, the Court explained:

> The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. *Scott* v. *McNeal*, 154 U.S. 34, 45; *Mobile & Ohio R. Co.* v. *Tennessee*, 153 U.S. 486, 492 *et seq.*; *Stearns* v. *Minnesota*, 179 U.S. 223, 232-233; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U.S. 164, 170; *Huntington* v. *Attrill*, 146 U.S. 657, 684; *New Orleans Waterworks* v. *La. Sugar Rfg. Co.*, 125 U.S. 18, 38; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 443.

Accord *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942) ("the existence of the contract and the nature and extent

of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution"); see generally *State of Nevada Employees Ass'n* v. *Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990) ("Federal law, not Nevada law, controls whether the state statutes at issue create contractual rights protected by the contract clause"). It is plain, then, that the split among the courts that petitioners have described (Pet. 11-14) presents a significant *federal* question, and not simply "a matter of state law about which the states are free to differ." Romein Opp. 16 n.16.[3]

II. THE REQUIREMENTS OF THE CONTRACT CLAUSE

Respondents' reaction to our demonstration that the Michigan Supreme Court's application of the Contract Clause was overly casual and in tension with this Court's and other courts' decisions is to repeatedly parrot the Michigan Court's anomalous conclusion that the $25 million impairment of petitioners' interests "cannot be deemed a substantial one." Romein Opp. 11-14. However, neither the quotation itself, nor the reasons advanced in its support, comes close to rebutting petitioners' claim that the Michigan Court's decision was unfaithful to the Contract Clause. And perhaps even more significantly, neither of the respondents has even attempted to challenge petitioners' demonstration that the lower federal and state courts

[3] Moreover, the Michigan Supreme Court's holding that the Contract Clause does not apply to workers' compensation issues is starkly inconsistent with its long line of holdings, in related contexts, that the workers' compensation statute does become part of the employment contract. See Pet. 13 n.4 (citing cases). There is strong reason for concern, then, that the state court is attempting to "evade the restraint of the [Contract] Clause by determining, through legislation or adjudication, that an arrangement previously regarded as a contract was no longer [contractual]." *Pineman*, 637 F.2d at 604.

have reached irreconcilable results on these issues, and that this Court's guidance is sorely needed.

In support of their claim that there was no substantial impairment here, respondents argue that petitioners had no legitimate right to rely on the 1981 enactment that allowed prospective coordination of all payments for future disability periods. By asserting that petitioners coordinated benefits at their peril, respondents seek to divert the Court's attention from the fact that the Michigan Supreme Court *unanimously* held that the plain language and legislative intent of the 1981 statute allowed employers to begin coordinating payments for all disability periods beginning after March 31, 1982. See *Franks* v. *White Pine Copper Div.*, and *Chambers* v. *General Motors Corp.*, reported together at 375 N.W.2d 715 (Mich. 1985). Given this authoritative construction of the 1981 statute, it is difficult to comprehend how respondents can continue to assert that petitioners were unjustified in coordinating benefits pursuant to the 1981 statute.[4]

Respondents further attempt to minimize the substantiality of the impairment to petitioners' interests by asserting that petitioners are taking a position here that is inconsistent with the judgment they benefited from in *Franks* and *Chambers*, where the Michigan Supreme Court rejected the employees' argument that the Constitution

[4] Respondents seek to make the 1981 statute seem unreasonable by pointing out that it allowed the coordination of benefits of some employees who had not received any increase in their benefit levels through a separate 1980 enactment. This argument is premised on a false nexus between the 1980 enactment that increased the benefits of some employees and the unrelated 1981 enactment that instituted coordination. Respondents offer no evidence that these measures were linked in any way, and the Michigan Supreme Court found no such linkage when it issued its decisions in *Franks* and *Chambers*. By characterizing these two distinct legislative measures as "[t]he 1980-81 legislative package" (Romein Opp. at 3), respondents seek to imply with rhetoric what they cannot support with fact.

forbids coordination of future benefits for those injured prior to the 1981 statute's effective date. This argument is fundamentally flawed, however, because it confuses the well-accepted state power to *prospectively* adjust payments (the issue involved in *Chambers*) and the until now unheard-of power to *retrospectively* enhance an employers' obligations for past, closed payment periods.

It was this precise dichotomy that was involved in the companion Michigan Supreme Court cases of *Franks* and *Chambers*. In *Chambers*, the court held that the legislature could constitutionally provide for coordination of benefits for all future benefit periods. 375 N.W.2d at 722-723. In *Franks*, by contrast, the court held that the 1981 statute did not allow employers to coordinate benefits for payment periods that had already closed, and that such a statute would be a retrospective impairment of rights. 375 N.W.2d at 730-731. This distinction is, of course, in keeping with the nature of the workers' compensation contract which requires employers to pay employees the amounts that the legislature has declared due as each new payment period arrives. See generally *id.* at 730 (unlike the situation in *Chambers*, "application of § 358 to alter liability for benefits due and payable prior to its effective date does constitute retrospectivity").

Consistent with this distinction, petitioners have never challenged the constitutionality of the 1987 statute as it relates to payment periods commencing after its effective date. Nor have petitioners challenged the general prospective increases in benefit levels that the legislature has enacted through the years. Petitioners do not question the legislature's authority to prospectively modify benefit levels for future disability periods. Such modifications can take the form of prospective increases in employer liability (as in the case of the prospective portions of the 1987 amendment) or prospective decreases in employer liability (as in the case of the prospective application of the 1981 amendment). The workers' compensation payments involved

in these cases compensate employees for each new period that they remain disabled, not for their underlying injuries. Thus, as long as legislative changes affect only future periods, they are not subject to attack as retroactive impairments of obligations.

Indeed, it is hard to believe that respondents are serious when they claim that the legislature is as free to retrospectively reopen past claim periods as it is to modify benefit levels for future disability periods. For if that were the case, then the legislature would not only be entitled to *increase* retroactively payments for closed periods as it has sought to do here, but would also be entitled to *decrease* retroactively employee payments for closed periods. For example, a legislature faced with the need to make concessions to in-state employers could declare that disability payments have been too generous over the past five years, and that employers are entitled to withhold payments to employees until such "overpayments" are recouped. Indeed, perhaps the legislature could even require the employees to return the now-declared "overpaid" amounts with interest, as employers are being forced to do under the 1987 amendment at issue here. This is obviously a ridiculous result which neither respondents nor the courts should ever be expected to support. But these results are the necessary consequence of respondents' failure to distinguish between prohibited retroactive and permissible prospective changes in workers' compensation benefit levels.[5]

III. THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

Instead of confronting petitioners' claim that the Michigan court's decision upholding five years of retroactive

[5] See also Brief of *Amici Curiae* Michigan Association of Insurance Companies, *et al.*, at 8-19 (discussing amendment's effect on insurance contracts).

benefit increases is out of step with the decisions of many courts throughout the country, respondents have sought to hide behind the Michigan court's conclusory pronouncements on the Due Process Clause. As we demonstrated in our petition (at 25-28), however, the Due Process Clause requires a level of inquiry into retroactive laws that was wholly absent from the Michigan court's approach here.

For example, the Michigan Supreme Court and respondents suggest that petitioners' reliance interest was diminished here because the 1987 amendment overruling *Franks* and *Chambers* was "entirely foreseeable." Romein Opp. 21 n.21. Yet neither the court nor any of the respondents point to even one example—in Michigan or elsewhere—where a legislature has required an employer to reopen closed periods and increase payments to employees who already received full payments in accordance with law in effect during their disability period. See Pet. App. 52a (Griffin, J., dissenting) ("prior to the majority's decision today, this Court never recognized or sanctioned a legislative attempt to overrule retroactively a decision of this Court"). It may have been foreseeable that the legislature would *prospectively* change the 1981 statute, but no one could have anticipated the oppressive and unprecedented *retroactive* scheme that the Michigan legislature incorporated into the 1987 statute during the final days before its passage.[6]

Similarly, respondents continue to insist that petitioners have not relied in any way on the 1981 statute. In our petition we explained how the level of anticipated workers' compensation liabilities is one of the factors considered when labor and management negotiate their collective bargaining agreements. See Pet. 15; see also *id.* at 12 n.3 (terms of workers' compensation laws are often modified by collective bargaining agreements). But quite aside from the effect that the statute had on petitioners' bargaining positions (which certainly qualifies as substantial reliance), the 1981 statute and the *Franks-Chambers* decisions allowed petitioners to begin coordination without seeking a judgment against individual employees. See *Chambers*, 375 N.W.2d at 726. Relying on that statute and those decisions, petitioners began coordinating benefits without going through the ministerial process of obtaining a judgment in each case. Yet, the Michigan Supreme Court has now declared that only those employers who obtained judgments are immune from the retroactive aspects of the 1987 amendment. See Pet. App. 14a. Obviously, petitioners would "have altered their course of conduct" (Pet. App. 8a) had they known about the 1987 amendment: they would have sought and easily obtained a judgment allowing them to coordinate benefits for each employee.[7]

Lower federal and state courts have struggled to interpret the somewhat contradictory messages that this Court has sent with respect to due process limitation on retroactive legislation. The *Romein* and *Gonzalez* cases are not, therefore, simply important opportunities for this Court to rectify a misapplication of the United States Constitution. They are also appropriate and timely vehicles for the Court to provide meaningful guidance on what limits the Due Process Clause places on purely retroactive legislation.

[6] See generally Brief of *Amicus Curiae* Michigan Self-Insurers' Association at 4-6. It bears repeating that the "entirely foreseeable" retroactive portion of the 1987 amendment was not even added to the legislation until eight days before its final passage. See Pet. 16 n.5.

[7] See also Brief of *Amici Curiae* National Association of Manufacturers, *et al.* (describing industry reliance).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

JACK F. WHEATLEY
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioners

MOTION FILED
APR 17 1991

(3)

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF MICHIGAN SELF-INSURERS' ASSOCIATION

STEPHEN L. KINSLEY*
MARTIN L. CRITCHELL
Conklin, Benham, Ducey,
Listman and Chuhran, P.C.
1740 First National Building
Detroit, Michigan 48226

Counsel for Amicus Curiae
Michigan Self-Insurers' Association

*denotes Counsel of Record

INLAND PRESS, DETROIT, MICHIGAN

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF AMICUS CURIAE OF MICHIGAN SELF-INSURERS' ASSOCIATION

STEPHEN L. KINSLEY*
MARTIN L. CRITCHELL
Conklin, Benham, Ducey,
Listman and Chuhran, P.C.
1740 First National Building
Detroit, Michigan 48226

Counsel for Amicus Curiae
Michigan Self-Insurers' Association

*denotes Counsel of Record

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Michigan Self-Insurers' Association ("MSIA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner General Motors Corporation and petitioner Ford Motor Company has been obtained. The consent of the attorney for respondent Attorney General of the State of Michigan has been obtained. The consent of the attorney for the respondent Evert Romein and respondent Arturo Gonzalez was requested but refused.

The interest of the MSIA in this case arises from the fact that it is a non profit association organized under the laws of Michigan that is comprised of more than two hundred employers and defined groups of employers that are authorized by the State of Michigan to insure their own risk of liability to their employees under the Michigan Workers' Disability Compensation Act ("WCDA"), Mich. Comp. L. Ann. 418.611(1)(a); Mich. Stat. Ann. 17.237(611)(1)(a). These members conduct business in all sectors of the economy ranging from manufacturing, sales, service, technology, health care, education and collectively employ hundreds of thousands of persons and, as equally significant, are presently responsible for workers' disability compensation benefits under the WDCA to tens of thousands of former employees.

Thus it is that the MSIA is vitally concerned with the WDCA and questions that involve validity and implementation.

In addition, each of the constituent members of the MSIA are subject to pending claims or are subject to future pending claims in the state courts under the specific legislation now challenged.

It is believed that the brief which *amicus curiae* requests per-

mission to file will contain a depth of perspective on the course of the legislation and the context in which it exists and thereby provide assistance in the deliberation of the constitutional issues involved.

Respectfully Submitted,

STEPHEN L. KINSLEY
Conklin, Benham, Ducey,
Listman and Chuhran, P.C.
1740 First National Building
Detroit, Michigan 48226
(313) 961-8690
Counsel Of Record, for *amicus curiae*
Michigan Self-Insurers' Association

TABLE OF CONTENTS

Subject: *Page*

TABLE OF AUTHORITIES ..... iv-v

SUMMARY OF ARGUMENT 1

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE *FRANKS* AMENDMENT REFLECTS THAT THERE HAS BEEN A VIOLATION OF THE CONTRACTS CLAUSE AND DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION 1

CONCLUSION 9

APPENDIX:

A. CERTAIN PROVISIONS OF THE MICHIGAN WORKERS' DISABILITY COMPENSATION ACT ..... AA

B. MEMORANDUM OF STATE REPRESENTATIVE MICHAEL GRIFFIN DATED, MAY 13, 1987 ..... BB

TABLE OF AUTHORITIES

U.S. Constitutional Provisions: *Page*

U.S. Const. amend. XIV, §1 2
U.S. Const. art. I, § 10. 2

Federal Case:

Marbury v *Madison*,
1 Cranch. 137, 2 L. Ed. 60 (1803) 6

Michigan Statutes:

Mich. Comp. L. Ann. 418.301(2);
Mich. Stat. Ann. 17.237 (301)(2) 4
Mich. Comp. L. Ann. 418.354(17-20);
Mich. Stat. Ann. 17.237(354)(17-20) 2
Mich. Comp. L. Ann. 418.862;
Mich. Stat. Ann. 17.237(862) 4
1912 Mich. Pub. Acts No. 10, Part II, §11. 2
1921 Mich. Pub. Acts No. 10 3
1927 Mich. Pub. Acts No. 63 3
1955 Mich. Pub. Acts No. 250, (Part 2, §4) 7
1980 Mich. Pub. Acts No. 357 3
1981 Mich. Pub. Acts No. 203 3
1987 Mich. Pub. Acts No. 28 2

State Cases:

Dean v *Chrysler Corp*,
434 Mich. 655; — N.W.2d — (1990). 3
Deziel v *Difco Laboratories, Inc., (After Remand)*,
403 Mich. 1; 268 N.W.2d 1 (1978). 4
Franks v *White Pine Copper Div*,
422 Mich. 636; 375 N.W.2d 715 (1985). 2, 4-10
Geis v *Packard Motor Car Co*,
214 Mich. 646; 183 N.W. 196 (1921). 3
Hurd v *Ford Motor Co*,
423 Mich. 531; 377 N.W.2d 300 (1985). 4

Lahti v *Fosterling*,
357 Mich. 578; 99 N.W.2d 490 (1959). 5, 7-9
McAvoy v *H.B. Sherman Co*,
401 Mich. 419; 258 N.W.2d 414 (1977) 4, 5, 7, 8
Romein v *General Motors Corp*,
436 Mich. 515; — N.W.2d — (1990) 2, 5, 6, 8, 9

SUMMARY OF ARGUMENT

A strong workers' disability compensation system is an important part of the welfare of the economy and of the people providing as it does an important link in the protection of employers as well as unemployed and underemployed workers. In Michigan, the legislature took action in 1980-1981 to so strengthen its particular workers' disability compensation system by harmonizing wage-loss benefits to be provided by employers with other wage-replacement systems that had become pervasive after the workers' disability compensation system was initially established. Mich. Comp. L. Ann. 418.354(1); Mich. Stat. Ann. 17.237(354)(1). Pursuant to this civil right and liability, employers "coordinated" wage loss benefits for five years. Then, in a complete surprise, the 1987 session of the legislature ended further coordination for a certain group of former employees — those injured before the original enactment — and mandated that those benefits that had been paid (or, were payable) for the time prior to the amendment in 1987 had to be recalculated even though the past-paid benefits were in scrupulous compliance with the law in-effect at the time payment had been made.

The MSIA shall show that this amendment requiring a redetermination of the civil rights and liabilities of employers for periods of time before the amendment was unprecedented and unprincipled.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF THE *FRANKS* AMENDMENT REFLECTS THAT THERE HAS BEEN A VIOLATION OF THE CONTRACTS CLAUSE AND DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Amicus curiae Michigan Self-Insurers' Association ("MSIA") supports the *Petition For Certiorari* filed by respondents General Motors Corporation and Ford Motor Company (collectively,

"Employer") following the decision by the Michigan Supreme Court in *Romein* v *General Motors Corp*, 436 Mich. 515; — N.W.2d — (1990), *reh. den.*, — Mich —; — N.W.2d — (1990) in which an amendment to the Michigan Workers' Disability Compensation Act ("WDCA"), 1987 Mich. Pub. Acts No. 28, codified at Mich. Comp. L. Ann. 418.354(17-20); Mich. Stat. Ann. 17.237(354)(17-20)[1] was held to be a valid exercise of the regulatory power of the Michigan Legislature over a challenge based on the Contracts Clause[2] and the Due Process Clause[3] of the United States Constitution. The MSIA presents four concerns that arise from legislative history.

First, the *Franks* Amendement is unprecedented in its scope. Since its inception in 1912,[4] the WDCA[5] has been repeatedly

[1]Popularly known as the *Franks* Amendment for the decision of the Michigan Supreme Court that it repudiated. *Franks* v *White Pine Copper Div*, 422 Mich. 636; 375 N.W.2d 715 (1985), *reh. den. sub. nom., Chambers* v *General Motors Corp*, 424 Mich. 1202; 389 N.W.2d 685 (1985).
See Appendix A for full text.

[2]The United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."
>
> U.S. Const. art. I, § 10.

[3]The United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. Const. amend. XIV, §1

[4]1912 Mich. Pub. Acts No. 10, Part II, §11 (1st Extra Session.) The WDCA was derived in large part from the compensation law initiated in Great Britian years before in 1897.

[5]This is a process that has occurred in Britian. Indeed, the British law of 1897 upon which the WDCA was itself amended in 1906.

amended to modify and to sometimes entirely redefine the civil rights and liabilities of employers and of employees. The longest continuous period of time that elapsed without any amendment to the WDCA was a five year period of time between 1922 and 1926, inclusive.[6] Indeed, the WDCA has been amended every single year between 1960 and 1983. A frequent reason for the fine tuning and, in some cases, major overhauls was the response by the Michigan Legislature to decisions of the Michigan Supreme Court over the implementation and interpretation of the WDCA. For example, the WDCA was amended in 1927 to counteract the impact of the specific decision of the Michigan Supreme Court, in *Geis* v *Packard Motor Car Co*, 214 Mich. 646; 183 N.W. 196 (1921) in response to its open invitation.[7] And the Michigan Supreme Court itself has recognized that the amendments in 1980[8] and in 1981[9] were designed to repudiate or modify certain interpretations of the WDCA that had been applied by the Supreme Court or Court of Appeals. *Dean* v *Chrysler Corp*, 434 Mich. 655; — N.W2d — (1990), *reh. den.*, 435 Mich. 1204; — N.W.2d — (1990). In that case, the Michigan Supreme Court said:

> "A purpose of the comprehensive 1980 and 1981 revisions of the workers' compensation system was to overturn or modify expansive interpretations placed upon the act by this Court. Although the dollar amount of benefits payable to workers eligible for compensation was increased, there can be no doubt that the Legislature also intended through its 1980 and 1981 reform efforts to narrow and restrict the eligibility qualifications."
>
> *Dean* v *Chrysler Corp*, *supra*
> at 666-667.

[6]1921 Mich. Pub. Acts No. 10 and 1927 Mich. Pub. Acts No. 63.

[7]The Michigan Supreme Court stated in *Geis*, *supra*, at 651; "We must stick to the statute and leave defendant to present the equity of its position to the legislature."

[8]1980 Mich. Pub. Acts No. 357.

[9]1981 Mich. Pub. Act No. 203.

See also, *Hurd* v *Ford Motor Co*, 423 Mich. 531; 377 N.W.2d 300 (1985) in which the Michigan Supreme Court recognized that another provision of the 1980-1981 amendments, codified at Mich. Comp. L. Ann. 418.301(2); Mich. Stat. Ann. 17.237 (310)(2), was designed to repudiate the earlier decision in the case of *Deziel* v *Difco Laboratories, Inc, (After Remand)*, 403 Mich. 1; 268 N.W.2d 1 (1978.)

Clearly then, the *Franks* Amendment is nothing new because it represents a legislative repudiation or modification of a decision of the Michigan Supreme Court that implemented or interpreted earlier legislation.

Rather, the *Franks* Amendment *is* unprecedented because it represents the only time in more than sixty years time of regular and extensive modification and redefinition of the civil rights and liabilities of employees and employers that the legislature ever applied itself to events that occurred *before* enactment. This is most important. Until the *Franks* Amendment, the Michigan Supreme Court consistently and strictly confined the application of any amendment of the WDCA to establish the civil rights and liabilities of affected employees and employers to the time *after* enactment even though initialized or "triggered" by events before enactment in order to avoid the constitutional problems now at-issue. For example, in the case of *McAvoy* v *H.B. Sherman Co*, 410 Mich. 419; 258 N.W.2d 414 (1977), *reh. den.*, clarification granted, 402 Mich. 953; — N.W.2d — (1977) the Michigan Supreme Court was concerned with an amendment to the WDCA that required an employer to pay an employee partial weekly workers' disability compensation benefits during an administrative appeal, Mich. Comp. L. Ann. 418.862; Mich. Stat. Ann. 17.237(862). The Michigan Supreme Court ruled that the provision was applicable to the time periods after its enactment even though initialized or "triggered" by an event that occurred before enactment; namely, a pending appeal. But the Michigan Supreme Court emphasized that the time periods before enactment were not subject to the amendment in order to avoid any constitutional issue under the Contracts Clause. *McAvoy, supra*, at 456-459. Indeed, in the case of *Franks* that was the subject of repudiation by the *Franks* Amendment, the Michigan Supreme Court went to lengths to emphasize that only the benefits running from the enactment were subject to it even though the initializing or "triggering" event for the payment was an award for injury that occurred before to the enactment. See also, *Lahti, infra.*

Thus, it is clear that the Michigan Supreme Court in the case of *Romein, supra*, has broken with its own precedent and broken new ground with the ratification of the *Franks* Amendment.

The second reason for concern over the *Franks* Amendment is its far reaching implications. The decision of the Michigan Supreme Court is not limited to the parochial area of workers' disability compensation. Instead, the decision of the Michigan Supreme Court represents authority for any assertion of legislative power to redefine or reorder civil rights and liabilities that *were* entirely settled under prior law.

It must be emphasized that the fact of the matter is that pursuant to the unanimous decision of the Michigan Supreme Court in *Franks, supra*, an employer *had* the civil right and duty to calculate and pay to an employee base weekly workers' disability compensation benefits from March 31, 1982, and *had* to adjust or "coordinate" such with any other parallel, employer-funded wage-replacement program. Now, under the *Franks* Amendment, that which was done in full and strict accord with contemporaneous law is declared illegal, impermissible and to be undone.

Certainly, the process that was "due" to employers and employees was that established by the Michigan Supreme Court in *Franks, supra*, and has been impermissibly abrogated.

The third concern is the disequilibrium in the administration of justice. The Court may well enquire what would be the law

when an even later session of the legislature enacted an amendment repudiating the *Franks* Amendment and revived *Franks* and required employees to refund all the money to now be reimbursed under the *Franks* Amendment. Under the decision of the Michigan Supreme Court in *Romein, supra,* such a later amendment would control. Of course, until yet another, still later session of the legislature repudiated that and revived the *Franks* Amendment.

Clearly, under the decision of the Michigan Supreme Court in *Romein, supra,* the law-making process and its applicability would *never* be settled. This is a cornerstone to the American system of law. In *Marbury* v *Madison,* 1 Cranch. 137, 2 L. Ed. 60 (1803) the Court ruled that the judicial branch had the duty to finally say what the law is. This, of course, may be changed by amendment for future events. But not for events already completed in accord with contemporaneous law. Otherwise, the legislature acquires the role of making the law *and* being the final arbiter of such and relegating the judiciary to an advisory body.

Certainly, the disequilibrium that is surely invited by the *Franks* Amendment is avoided and prevented by the Contracts Clause and Due Process Clause.

Fourth, the history of the *Franks* Amendment itself reflects a serious misunderstanding by the enacting legislators. In Michigan there is no parallel to the *Congressional Record* so that the thoughts and concerns of the sponsors and supporters of legislators is not generally available.

In this case however, there is available a good indicia of the concern of the sponsors and supporters of the *Franks* Amendment about its constitutionality. That official legislative indicia is a memorandum dated May 13, 1987, from State Representative Michael Griffin. State Representative Griffin said:

> "MEMORANDUM
> "TO: House Members and the Capital Press Corps
> "FROM: State Representative Michael J. Griffin
> "RE: Constitutionality of Governor Blanchard's workers' compensation/'*Chambers*' proposal

> "For the past few days several legislators have questioned the constitutionality of Governor Blanchard's proposed amendment to completely overturn the Supreme Court's unfair *Chambers* decision.
>
> "The attached opinion from a respected legal firm specializing in labor law argues that this is not the case.
>
> "I agree with their opinion and urge you to resist efforts to change the Governor's *'Chambers'* proposal based on the so-called constitutionality issue."

Quite clearly, just one day before enactment of the *Franks* Amendment on May 14, 1987, there was a significant concern over the validity of the retrospective nature of the *Franks* Amendment.

The memorandum referenced by State Representative Griffin cited a case decided by the Michigan Supreme Court that purportedly authorized a purely retroactive amendment, *Lahti* v *Fosterline,* 357 Mich. 578; 99 N.W2d 490 (1959.) Specifically, the opinion referenced by State Representative Griffin declared:

> "It is well established, however, that a change in the remedies afforded under contract are not prohibited. *Lahti* v *Fosterling,* 357 Mich 578, 595 (1959):
>
> " '. . . no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law . . .'"

The problem is that *Lahti, supra,* is in no way different at all from the rule announced by the Michigan Supreme Court in cases such as *McAvoy, supra* or *Franks, supra.* In that case, the Michigan Supreme Court was concerned with an amendment to the WDCA of June 25, 1955[10] that redefined the civil right and liability for medical care cost reimbursement for an occupational injury. The employee in that case sought payment of medical

[10] 1955 Mich. Pub. Acts No. 250 (Part 2, §4)

care that was provided *after* 1956.[11] Clearly, there was no issue in *Lahti, supra,* that medical care cost incurred *before* the 1955 amendment could not be ordered when certainly barred under the contemporaneous law. All that was claimed was medical care cost reimbursement for service after the amendment. That is absolutely no different than the situation in *McAvoy, supra,* or in *Franks, supra,* where the statute in-effect *contemporaneous* to civil rights was applied; and that amendment was not applied to civil rights *prior to* the enactment.

Clearly then, the 1987 session of the legislature did not have a clear understanding of the serious action it implied with the enactment of *Franks* Amendment. The presumption of the constitutionality of a statute is not fully applicable.

A final consideration is the notation by the Michigan Supreme Court in *Romein* concerning the reasonability of the *Franks* Amendment. The Michigan Supreme Court said in *Romein, supra,* at 536;

> "The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen here are reasonable in the light of deference given to legislative action. 'As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' *United States Trust Co* v New Jersey, 431 US 1, 22-23; 97 S Ct 1505; 52 L. Ed 2d 92 (1977). The means are also reasonable since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute. The judicial interpretation that allowed for the setoff was deemed to be incorrect and the setoff must be returned, not an unreasonable solution."

[11]The Michigan Supreme Court observed the following facts in *Lahti, supra,* at 581:

> "John Lahti was injured on October 4, 1954, while working as a wood-cutter for the defendant employer.
>
> "He was a bed patient from that time until his death on February 10, 1958. He suffered a comminuted and compound fracture of the skull, permanent paralysis, loss of speech, and inability to consume food in the natural manner, and was totally and permanently disabled, requiring continuous and substantial medical, nursing, and hospital care.
>
> "The expense of the continuous hospitalization and medical care was voluntarily assumed by the defendants through October 4, 1956, a period of 2 years, or 4 six-month periods from the date of the injury. Compensation at the regular rate was also paid plaintiff."

As indicated, the deference to the legislature is not entirely warranted here in light of the inapplicability of *Lahti, supra.* But more to the point, the Michigan Supreme Court in *Romein* appeared to believe that its decision in *Franks* was "unexpected." *Franks* was not an "unexpected" circumstance. The statute construed by the Michigan Supreme Court in *Franks, supra,* was just as clear and as unequivocal as the Supreme Court had said it was. It went unchallenged for more than a year. What truly has occurred here is that a differently comprised legislature decided to redefine *existing and established* civil rights and liabilitites. That is not the law. That is not constitutional.

CONCLUSION

The Petition For A Writ Of Certiorari To The Supreme Court Of Michigan should be granted to the Petitioners.

Respectfully Submitted,

STEPHEN L. KINSLEY
Conklin, Benham, Ducey,
Listman and Chuhran, P.C.
1740 First National Building
Detroit, Michigan 48226
(313) 961-8790
Counsel Of Record, for *amicus curiae*
Michigan Self-Insurers, Association

AA

APPENDIX

MICHIGAN WORKERS' DISABILITY COMPENSATION ACT
1987 Mich. Pub. Act No. 28.

The decision of the Michigan supreme court in *Franks* v *White Pine Copper Division*, 422 Mich 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, if having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

This section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement of the employer or carrier.

Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier.

Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier.

If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not effect the validity of the remainder of this section.

HOUSE OF REPRESENTATIVES
Representative
Michael J. Griffin
50th District — Jackson

May 13, 1987

MEMORANDUM

TO: House Members and the Capitol Press Corps
FROM: State Representative Michael J. Griffin
RE: Constitutionality of Governor Blanchard's workers' compensation/*"Chambers"* proposal

For the past few days several legislators have questioned the constitutionality of Governor Blanchard's proposed amendment to completely overturn the Supreme Court's unfair *Chambers* decision.

The attached opinion from a respected legal firm specializing in labor law argues that this is not the case.

I agree with their opinion and urge you to resist efforts to change the Governor's *"Chambers"* proposal based on the so-called constitutionality issue.

SACHS, NUNN, KATES, KADUSHIN, O'HARE,
HELVESTON, WALDMAN, P.C.
Attorneys and Counselors At Law
1000 Farmer
Detroit, Michigan 48225

May 12, 1987

TO: Frank Garrison, President
Michigan State AFL-CIO
FROM: Melvyn J. Kates
Granner S. Ries
RE: Proposed "Chambers Language in the House Substitute for S.B. 67

Governor Blanchard's proposed amendments to the worker compensation law includes a provision to completely reverse the effects of the 1985 *Chambers* decision of the Michigan Supreme Court.

Since that time, some have contended that this proposal is unconsitutional.

We disagree.

The rationale is outlined in the attached four pages.

The power of the legislature to pass retrospective laws is limited primarily by the constitutional maxim that such retrospective legislation may not impair the obligation of a contract. *Metro Homes Inc.* v. *City of Warren*, 19 Mich App 664, 671-672 (1969). It is well established however, that a change in the remedies afforded under a contract are not prohibited. *Lahti* v *Fosterling*, 357 Mich 578, 595 (1959):

> ". . . no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law . . ."

Lahti relied extensively upon a decision in New York entitled *Matter of Hogan* v *Lawlor & Cavanaugh*, 286 App Div 600; 146 NYS2d 119, wherein at page 604, the New York court stated:

> "The due process clause of the State and Federal con-

stitutions does not freeze the burden of compensation liability as of the date of the occurrence of an industrial accident, beyond the power of legislative change. *In carrying out its social purpose, the legislature has the power to increase the burden on the employer for disability occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time.*"

Consequently, the legislature in adjusting the employer's obligation to pay workers' compensation benefits has the power to increase the burden of payment even though the expense occurred prior to that the effective date of amendatory statue.

A restoration of the employer's obligation to make payment of workers' compensation benefits without consideration of other benefits, as existed prior to 1982, does not create a new cause of action for an employee and merely remedies an existing injustice through the limitation of a statutory defense. No contractual right is destroyed in such circumstances:

> ". . . no right is destroyed when the law restores a remedy which has been lost."
>
> *Lahti, supra* at 589; quoting *Evans Products Co* v *State Board of Escheats*, 307 Mich 506, 545, quoting from *Campbell* v *Holt*, 115 US 620; 65 SCt 209; 29 LEd 483

It is to be noted that the restoration of benefits previously withheld must be made within 60 days *after* the effective date of the amendment and that no penalty is imposed upon the employer for failure to make earlier payment. This remedies any potential constitutional problem for, whatever extent employers or carriers may have relied upon the previous statute or decisions interpreting it, there is no vested right in the previous statute and the remedies provided thereunder may be altered without impairing the obligation of a contract. *Lahti, supra* at 595.

The constitutionality of a proposal to restore benefits lost via the Court's decision in *Franks* v *White Pine Copper*, 422 Mich 636 (1985), may also be justified as curative legislation. Curative legislation does not impair the obligations of a contract and is merely designed to authorize what the legislature had the power to authorize but, through omission, failed to do so. *Stott* v *Stott Realty Co*, 288 Mich 35 (1939), relying upon the rule that there is "no vested right in statutory privileges of exemptions" page 44, and "no vested right to any particular remedy;" page 46

An example of curative legislation in a workers' compensation context is found in *Freij* v *St Peters Church*, 72 Mich App 46, *aff'g*, 12975 WCABO 3223. The legislature had previously passed a law which reduced the payment of workers' compensation benefits by 5% per year for individuals who were 65 years old or older. However, the legislation reduced those benefits for those individual on the assumption that they would be receiving social security benefits even for those individuals who were not, in fact, receiving those benefits. Subsequently, the legislature enacted 1974 PA 184 and created an exception, codified as MCL 418.357(2), stating that the reduction could not be applied to those individuals who were not entitled to social security benefits. The Court of Appeals held that, regardless of what the legislature intended when the legislation was originally enacted, "it seems apparent that the 1974 amendment must have been intended to remedy what had come to be perceived as a pernicious consequence of the existing legislation; that benefit recipients were having their benefits reduced even though they did not begin to receive social security payments", *Freij, supra* at 460, and the Court affirmed the ruling of the Appeal Board that the amendment was retroactive and could be applied to eliminate the reduction in benefits previously enacted but not intended to be applied to individuals injured previously.

Supreme Court, U.S.
FILED
APR 17 1991
OFFICE OF THE CLERK

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICUS CURIAE*, THE NATIONAL COUNCIL OF SELF-INSURERS, IN SUPPORT OF PETITIONER

DOUGLAS F. STEVENSON
STEVENSON, RUSIN AND FRIEDMAN, LTD.
10 South Riverside Plaza
Suite 1530
Chicago, Illinois 60606
(312) 454-5110

Counsel for Amicus Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION ..	8

I.

THE DECISION BELOW VIOLATES THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION. THIS COURT DECLARED IN *STATE INDUSTRIAL COMMISSION* v. *NORDENHOLT CORP.*, 259 U.S. 263 (1922), THAT A WORKERS' COMPENSATION "AWARD IS READ INTO AND BECOMES PART OF THE CONTRACT" OF EMPLOYMENT. SO, ALL THE PAYMENTS MADE HERE FROM 1982 TO 1987 WERE PURSUANT TO THAT EMPLOYMENT CONTRACT, IN ACCORDANCE WITH THE 1981 STATUTE AND ITS EXPRESS APPROVAL BY THE MICHIGAN SUPREME COURT IN 1985. THESE PAYMENTS VALIDLY DISCHARGED CONTRACTUAL OBLIGATIONS. THE DECISION BELOW REOPENS ALL THESE CONTRACTS AND DEFINITIVELY INVADES THE CONSTITUTIONAL PROVISION FORBIDDING THE IMPAIRMENT OF CONTRACTS 8

A. The Contract Clause Is Stated In Terms As Absolute As The First Amendment's Protection Of Free Speech. It Forbids "Any Law Impairing The Obligation Of Contracts" 10

B. The Majority Opinion Below Does Not Pass Any "Rational Relationship Test" Even If That Test Is Applicable 11

1. The Impairment of Contract Is Not Substantial 12

2. There Is No Impairment Because "the Defendants Knew That Their Rights Were Subject to Alteration" 13

3. The Legislature and the Courts May Impair Contracts in the "Reasonable Exercise of the Police Power" 14

II.

LEGISLATORS MAY ACT ONLY DURING THE PERIOD THEY HOLD OFFICE. A CURRENT LEGISLATURE CANNOT ACT FOR OR BIND FUTURE OR PAST LEGISLATORS WITHOUT VIOLATING DUE PROCESS OF LAW 16

CONCLUSION 20

APPENDIX:

U.S. Department of Labor, January, 1990, "Offset Provisions in State Workers' Compensation Laws" 1a

TABLE OF AUTHORITIES

Cases PAGE

Alessi v. *Raybestos-Manhattan Corp.*, 451 U.S. 504 (1981) 3, 4

Allied Structural Steel v. *Spannaus*, 438 U.S. 233 (1978) 12, 14, 18

Brown v. *Elder Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984) 9, 12

Chambers v. *General Motors Corp.*, 422 N.W.2d 715 (1985) 6

Chicago Board of Realtors v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987) 11

Energy Reserves Group v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 13

Franks v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985) 6, 17

Garris v. *Hanover Insurance Co.*, 630 F.2d 1001 (4th Cir. 1980) 15

Home Building & Loan Assn. v. *Blaisdell*, 290 U.S. 398 (1934) 11

Richardson v. *Belcher*, 404 U.S. 78 (1971) 4, 5

State Industrial Commission v. *Nordenholt Corp.*, 259 U.S. 263 (1922) 8

Thomas v. *Parker Rustproofing Co.*, 284 Mich. 260, 279 N.W.2d 504 (1938) 9

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 9, 15

Other Citations

Article I, Section 10, *U.S. Constitution* 10

Michigan Statutes:

MCL 418.833(a) 10

MCL 418.833(2) 10

Public Act 203 of 1981 16

Public Act 357 of 1980 15

American Bar Foundation Journal, 1987, pp. 379 et seq. "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity" . 17, 18, 19

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, *Petitioner*

v.

EVERT ROMEIN, ET AL., *Respondents*

FORD MOTOR COMPANY, *Petitioner*

v.

ARTURO GONZALEZ, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICUS CURIAE*, THE NATIONAL COUNCIL OF SELF-INSURERS, IN SUPPORT OF PETITIONER

(Pursuant to the consent of all the parties, this brief is filed under Supreme Court Rule 37.)

The National Council of Self-Insurers speaks for major employers of the United States, frequently multi-state employers. These are employers who assume the direct responsibility of paying workers' compensation benefits to their employees, a method sometimes referred to as "self-insuring" under applicable state and federal workers' compensation laws. It is generally accepted that 30% of the employees of the United States work for employers who are self-insured.

This National Council is also the parent organization for 30 state self-insurance associations who are active in each state on workers' compensation issues.

The National Council supports the workers' compensation laws as an essential part of the social and economic framework of our society. But, like our state and federal governments, the National Council is concerned with the proliferation of duplicating benefits in our society. The cost of benefits has grown enormously, affecting price levels to consumers and inhibiting the ability of United States employers to export their products.

The proliferation and cost of benefit programs is the subject matter of this case.

STATEMENT

The workers' compensation issue before the Court in this matter is often described as "coordination" or "integration" of benefits, the offsetting of alternative benefits for income maintenance against workers' compensation benefits for that same income maintenance purpose.

The issue has a historic background. Workers' compensation was this nation's first no-fault program for sustaining the income capacity of an employee injured in his

employment. In the 1910-1920 period, every state and the federal government adopted workers' compensation statutes covering employment in each jurisdiction.

Beginning in the 1930's, other programs developed to maintain the income of individuals suffering wage loss for other reasons. The federal government enacted unemployment benefits for the unemployed, and social security for retirees and the disabled. These programs were independently enacted with little regard for each other, and without regard to other duplicative programs, such as workers' compensation.

Following World War II, programs for group insurance, for weekly benefits payable during a period of non-occupational disability, and for company retirement programs developed rather fully in major industries. Many of these private income maintenance programs were adopted without regard for the other programs already in place for income maintenance.

As a result, individuals in our society often sought and obtained income maintenance benefits from more than one of these programs. In combination, amounts received by an individual for income maintenance while not working often exceeded his earnings when he did work.

As a corollary, efforts to control the costs of workers' compensation, social security, pension programs and medical disability programs were totally frustrated when all these income avenues were available and could accumulate.

The effort to coordinate or integrate these various benefits to prevent abuse has been a continuing one. In the last section of the Occupational Safety and Health Act of 1970, Congress created the National Commission on State Workmen's Compensation Laws (84 Stat. 1600 *et seq.*) to examine and make recommendations about workers' compensation. That Commission reported its recommendations back to Congress in 1972. Its Recommendation R. 33 stated:

> We recommend that . . . the benefits of other public insurance programs should be coordinated with workmen's compensation benefits. *Report of National Commission on State Workmen's Compensation Laws*, p. 58.

The International Association of Industrial Accident Boards and Commissions (the association of state workers' compensation administrators, commonly referred to as the IAIABC) formally adopts recommended standards for all the states. In 1980 it adopted coordination of benefits as one of its standards:

> 11. Coordination of Benefits
>
> Compensation payable for total disability or survivor benefits should be coordinated under the jurisdiction's law with social security and other employer-funded disability programs so as to best effectuate the objectives of wage replacement and rehabilitation.

And in the explanation, it added ". . . to avoid overlapping and duplication of benefits." This remains its current standard. *Journal of International Association of Industrial Accident Boards and Commissions*, Summer Issue, 1990, p. 43.

The importance of controlling the costs of these multiple benefit programs did not escape Congress. In 1974, Congress enacted ERISA, a program governing pension plans. ERISA expressly permits this same coordination or integration of benefits. In 1977, when the State of New Jersey passed a statute forbidding any integration or coordination of workers' compensation and pension benefits, this Court in *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981), declared the state statute null and void as preempted by ERISA, a federal law. This preserved the same coordination or integration of benefits involved in the instant case.

The Congress in 1967 amended the Social Security Act to require coordination (or offsets) between workers compensation and social security disability benefits. Sec. 224, Social Security Act, upheld in *Richardson v. Belcher*, 404 U.S. 78 (1971).

Alessi was decided in March, 1981. The Michigan legislature in December of its 1981 session adopted, effective March 31, 1982, integration or coordination of workers' compensation with pensions and social security benefits much like this Court described in *Alessi*. Its action was prospective; no claimant had to pay back any amounts previously received, but continued "double dipping" was eliminated.

The instant case arises because of the efforts of the plaintiffs below to retain the duplicating benefits of pension, social security, and workers' compensation, which collectively exceeded the plaintiffs' income when they worked.

The facts of this case, as stated by the majority opinion below, portray the 1981 situation. Plaintiff (and GM employee) Romein was receiving $12,513.80 a year in workers' compensation benefits, pursuant to a formula entitling him to two-thirds of his gross earnings. Such workers' compensation benefits are tax-free under Internal Revenue Code §104(a)(1), so this $12,513.80 was very close to his former "take home pay" when he worked. In addition, Romein was receiving social security and General Motors' company pension, which with his workers' compensation benefits totalled $19,377.80 a year, more than he had ever made when he worked, and virtually all of it tax free.

The Michigan legislature, concerned about its business climate and its unemployment rate of over 14%, passed a statute in 1981 forbidding these duplicative payments. Aside from the background of recommendations by the National Commission and the IAIABC, *supra*, and this

Court's decision in *Alessi*, its statute was supported by copious legislative history concerning its aims and purposes, perhaps best summarized in Governor William Milliken's statement:

> . . . we must keep in mind that the purpose of workers' compensation is to restore wage-earning capacity lost in on-the-job accidents. Workers' compensation was never intended to be more lucrative than gainful employment, or be a retirement bonus . . . . (Governor Milliken, November 18, 1981, quoted in the Opinions below)

(This Court noted and followed the same rationale in upholding Congress' action for "coordination of benefits" between social security and workers' compensation in *Richardson v. Belcher*, 404 U.S. 78 (1971), noting that the two benefits collectively exceeded earnings.)

Against this background, the Michigan legislature enacted its "coordination of benefits" legislation in 1981, effective March 31, 1982. The workers' compensation benefit (two-thirds of wages on a tax-free basis) was not reduced, and if he was truly retired (and 62 years of age), he could receive half of his social security benefits (the 50% paid for by his own tax payments) in addition. But, the statute provided that the employer could offset any employer-financed wage loss programs such as company pensions against its workers' compensation obligation. There was no retroactivity; no claimant had to pay anything back. The "double dipping" was eliminated only as payments became due after March 31, 1982. Thus, this statute put some control on the problem of proliferating, accumulating benefit costs.

This workers' compensation problem in Michigan was not peculiar to Michigan. Some 25 states in this same general period took action to prevent this "double dipping" of benefits. Attached hereto as Appendix 1 is the 1990 U.S. Department of Labor publication summarizing similar

statutory changes in 25 other jurisdictions, all set forth in Table 17 of this U.S. Department of Labor publication.

The Michigan Supreme Court upheld the validity of this 1981 legislation in 1985, holding against plaintiffs like Romein in this case. *Franks* v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985). The pragmatic result was that an employee received the highest benefit allowable under any single program (usually his workers' compensation benefit), but not a combination of all these wage loss programs. This decision was entered in 1985, in a combined opinion, one citation covering the two cases. *Franks* v. *White Pine Copper Div.* and *Chambers* v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985).

The definitive legislation of 1981, confirmed by Michigan's highest court, did not settle this issue in Michigan. Thus this case and this Petition for *Certiorari*. In 1987, the Michigan legislature sought to overturn the Supreme Court decision of 1985. Its method was peculiar; it did not change the 1981 legislation in any respect, but provided only that those injured before its effective date of March 31, 1982 should continue to receive multiple benefits. Almost like a "bill of attainder," the 1987 legislative action named the case and stated that the Michigan Supreme Court decision of 1985 had misconstrued the 1981 legislative intent. The actual statute reads as follows:

> The decision of the Michigan Supreme Court in *Franks* v. *White Pine Copper Div.*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability . . . for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to affirm this intention . . . . Michigan Acts, 1987, PA 28, Sec. 354(17).

This 1987 act then directed employers to pay all arrearages back to 1982 within 60 days, with interest.

As Chief Justice Riley points out in the dissent, p. 8, only "11 of the 26 senators" who voted in 1981 were still in the Senate in 1987, and only "20 of the 62 representatives" who voted in 1981 were around in 1987. The 1987 action reflects the "intention" of its 1987 members, not the intention of the members voting in 1981.

The instant case arises from these plaintiffs suing General Motors and Ford under this 1987 act for all the arrearages in the multiple payments since March 31, 1982, despite the Michigan Supreme Court decision of 1985 declaring that General Motors and Ford (and all other employers) had validly discharged these precise obligations. The Court below then overruled its 1985 decision, bowing to this newly declared "intent," and upheld plaintiffs' claim retroactively back to March 31, 1982, the effective date of the earlier statute. It is this decision for which *certiorari* is sought.

The issue before this Court is of great importance to this *amicus curiae*, the National Council of Self-Insurers, which has members in the 25 states who have enacted similar "coordination of benefit" programs.

For General Motors and Ford, the claims of these plaintiffs amount to a retroactive $25-million liability. While Ford and General Motors may be two of Michigan's largest employers, these two collectively are a distinct minority of all Michigan employers who will now be required to make the retroactive back payments, with interest, commanded by the 1987 statute and the decision below of the Michigan Supreme Court. The total liability is in gross an amount considerably greater than the $25-million mentioned in the decisions below.

Further, the question here, getting some kind of control over the proliferation and overlapping of benefit programs, is important to the nation's economic health and is being

addressed currently by many organs of government, federal, state, and local. That effort gets a decided jolt by decisions such as this one by the Michigan Supreme Court.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW VIOLATES THE CONTRACT CLAUSE OF THE U.S. CONSTITUTION. THIS COURT DECLARED IN *STATE INDUSTRIAL COMMISSION* v. *NORDENHOLT CORP.*, 259 U.S. 263 (1922), THAT A WORKER'S COMPENSATION "AWARD IS READ INTO AND BECOMES PART OF THE CONTRACT" OF EMPLOYMENT. SO, ALL THE PAYMENTS MADE HERE FROM 1982 TO 1987 WERE PURSUANT TO THAT EMPLOYMENT CONTRACT, IN ACCORDANCE WITH THE 1981 STATUTE AND ITS EXPRESS APPROVAL BY THE MICHIGAN SUPREME COURT IN 1985. THESE PAYMENTS VALIDLY DISCHARGED CONTRACTUAL OBLIGATIONS. THE DECISION BELOW REOPENS ALL THESE CONTRACTS AND DEFINITIVELY INVADES THE CONSTITUTIONAL PROVISION FORBIDDING THE IMPAIRMENT OF CONTRACTS.

It is rudimentary that a workers' compensation statute becomes part of every employment contract covered by that statute, as this Court expressly held in *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Workers' compensation awards become part of that contractual obligation:

> The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum . . . . *Ibid.*, p. 271.

If not paid, this contractual obligation to pay can be sued upon and enforced like any other contractual obligation.

The scope of a contract embraces not just the contract itself, but the state law and its judicial interpretations,

as this Court held in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977). At pp. 19-20, it is stated:

> The obligations of a contract have long been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement.

Thus the 1981 statute and the 1985 decision of the Michigan Supreme court construing it constitute the contract here, a contract which is retroactively cancelled by the decision below. Past completed transactions pursuant "to the express terms . . . and contemporaneous state law" have been reopened and new and different liabilities created. This is precisely what the Contract Clause forbids.

Michigan's own decisions as well as those of this Court hold that workers' compensation obligations are contractual obligations. *Brown* v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984); *Thomas* v. *Parker Rustproof Co.*, 284 Mich. 260, 279 N.W.2d 504 (1938).

The court below, on its own, makes one exception to its retroactive judgment, a curious exception in view of the broad, retroactive sweep it gives to the 1987 statute. It bows to the concept of *res judicata*, by exempting from the 1987 statute any case in which the parties had sued each other and that suit had reached a final judgment.

This produces a curious result; those who respected the words of the legislature and the judicial holding in 1985 are the ones who now must pay the retroactive tribute. Those who did not respect the law and resorted to litigation are exempt from it.

The doctrine of finality is the principle of *res judicata*, as well as that of the Contract Clause. It is embodied in other sections of Michigan's workers' compensation statute, sections not mentioned by the majority below or by the legislative act. One section provides, as a restriction on an employee reopening past transactions:

> . . . no compensation shall be ordered for any period which is more than one year prior to the date of such action. MCL 418.833(a).

The other section of the statute restricts an employer from reopening completed transactions after one year:

> When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than one year prior to the date of taking such action. MCL 418.833(2).

These two sections, bilaterally fair to employee and employer, were not mentioned in the 1987 statute or in the opinion below. They remain unimpaired in the statute, although the first quoted section is cancelled by the decision below, wthout acknowledging it even exists.

Thus, the statutory scheme of finality of all workers' compensation transactions after one year is totally breached here; completed transactions running back to March 31, 1982 are reopened by the decision below.

The opinion seems to believe making this exception for *res judicata* saves it from what might otherwise be a violation of the U.S. Constitution. It does not; "finality" is the basis of the Contract Clause, too. We are dealing with completed contractual transactions protected by the Contract Clause.

A. The Contract Clause Is Stated In Terms As Absolute As The First Amendment's Protection Of Free Speech. It Forbids "Any Law Impairing The Obligation Of Contracts."

Article I, Section 10 of the U.S. Constitution provides simply that "no state shall . . . pass any . . . law impairing the obligation of contracts . . . ."

The Michigan court below reads the contract clause as if it stated, "No state shall pass any law *unreasonably* impairing the obligations of contracts." "Reasonable" or

"unreasonable" is not the issue when the constitutional impairment stands alone as here, with no competing constitutional issue involved.

In *Chicago Board of Realtors, Inc.* v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987), Judge Posner wrote at p. 743:

> Imagine what freedom of speech would have come to mean if the court had interpreted the first amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it interprets the contract clause.

Amicus suggests that the contract clause should be enforced as it is written in the Constitution in the instant case. There is no competing constitutional value to weigh in this case, nor any "compelling demonstration of necessity" requiring that the contract clause be regarded as just one of a hierarchy of constitutional values. Nor is there any crisis shown here even faintly resembling the problem faced by this Court in the 1934 Depression requiring any balance of competing considerations as in *Home Building & Loan Association* v. *Blaesdell*, 290 U.S. 398 (1934).

Cases may arise presenting a conflict between two constitutional values, each absolute in itself, where some rule of reason may have to be applied. But in this case, only one constitutional value is involved, the Contract Clause and the Rule of Law in our society. No countervailing constitutional value is asserted which requires any weighing or "rational relationship" test.

The court below had no basis even to explore any "rational relationship" test.

B. The Majority Opinion Below Does Not Pass Any "Rational Relationship Test," Even If That Test Is Applicable.

The majority opinion seems to state first that there is no contract here to be impaired, despite the Michigan de-

cisions clearly holding that these workers' compensation issues involve contractual obligations. *Brown* v. *Eller Outdoor Advertising Co.*, 139 Mich. App. 7, 360 N.W.2d 322 (1984).

The majority below then quickly leaves this position, admits there is a contract and a contractual impairment here, and discusses whether it can be justified. For this purpose, it launches into a three-part balancing test. Opinion, pp. 16-19, with the following assertions:

1. The Impairment of Contract Is Not Substantial.

One assertion of the majority below is that the impairment of contract is not substantial. *Amicus* submits that the $25-million liability imposed on Ford and GM is "substantial."

The majority opinion below avoids discussion of such a simple answer to its own question by going to the opposite extreme. It launches into a discussion of the employer's immunity from tort actions, asserting this immunity to be the "basic benefit" to the employer. Because this "basic benefit" is undisturbed by the 1987 legislation, the majority declares there is no "substantial" impairment of contract.

Under this analysis, any amount of retroactive liability, perhaps tripling the compensation payments in all cases since 1920 (with compound interest) would be permissible, so long as the exclusive remedy was not disturbed. *Amicus* submits this is not the law.

This Court held in *Allied Structural Steel* v. *Spannaus*, 438 U.S. 233 (1978), that requiring an employer to pay pensions which had not yet contractually vested was a "substantial impairment of contractual expectations." The question according to Justice Stewart is whether something significant *has been taken away* by the statute, not whether it leaves anything of some value. (The sum involved in

Spannaus was $185,000 compared to the stated $25-million liability and was held to be a substantial impairment.)

Under the majority's analysis, there must be a total destruction of all value before a legislative act could be considered unconstitutional. But, as this Court has repeatedly held, "total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group* v. *Kansas Power & Light*, 459 U.S. 400 at 411 (1983); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 at 26-27 (1977). Most lower courts have so held, too. *State of Nevada Employees Association* v. *Keating*, 903 F.2d 1223, at 1227 (1990) (restriction of employees' right to withdraw pension contributions without penalty); *Michael* v. *Workers' Compensation Court*, 763 P.2d 1122, 1125 (Montana, 1988) (mandatory mediation of disputes causing delay in recovering benefits).

So, contrary to the majority opinion below, the issue under the contracts clause is whether something substantial has been *taken away*, not whether anything of value is left. The decision below took "substantial" amounts away from these defendants.

2. There Is No Impairment Because "the Defendants Knew That Their Rights Were Subject to Alteration."

This is a second pillar of the majority's balancing test, and it doesn't fit this case. Every citizen knows that future rights may be altered by a legislature. But, if past completed transactions can be reopened and altered, then no one in our society can possess any reasonable expectations or the confidence required to plan future commitments. Under the majority opinion below, there is no finality at any time, on any issue, and no transaction is ever over or closed. No business, no citizen can make any plans for the future, if the past is so unstable.

Justice Stewart, in *Allied Structural Steel* v. *Spannaus*, *supra*, wrote:

> If the Contract Clause is to retain any meaning at all, it must be understood to impose some limits upon the power of a state to abridge existing contractual rights, even in the exercise of its otherwise legitimate police power. 438 U.S. at 242.
>
> Contracts enable individuals to order their personal business affairs . . . . Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. *Ibid.* at 245.

There can be no stability in this nation's affairs if legislatures can suddenly reopen several years of completed transactions and decree them null and void. The Contract Clause forbids such gross alteration.

No citizen can plan a future, if they cannot rely on the finality of past, completed transactions. These petitioners had the legitimate expectation, protected by the Constitution, that these past, completed transactions would not be altered.

3. The Legislature and the Courts May Impair Contracts in the "Reasonable Exercise of the Police Power."

This statement from the majority opinion is much too broad. If the police power is unlimited, there is no room left for the Contract Clause, the First Amendment, *res judicata*, or any other constitutional right. Such a statement leaves no place for the Rule of Law in our society.

> If the contract clause is to retain any meaning at all . . . it must be understood to impose some limit up on the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. J. Stewart in *Allied Structural Steel* v. *Spannaus*, 438 U.S. at 242. See also *Pension Benefit Guaranty Fund* v. *R. A. Gray & Co.*, 467 U.S. 717 (1984); *United States Trust Co.* v. *New Jersey*, 431 U.S. at 22.

As to whether the 1987 legislation meets any special need requiring the use of the police power, there is absolutely no legislative history or record concerning that need, no problem described in a legislative record, no explanation of any problem or how this legislation meets the problem. *Garris* v. *Hanover Insurance Company*, 630 F.2d 1001 (4th Cir. 1980) at p. 1009 states the necessity of legislative sources to evaluate the rationality of a contract clause challenge. There is none in this case.

The majority opinion, however, invents its own assumption to support the lack of any legislative finding of problem or need. It assumes, although it is nowhere stated in the statute or legislative history, that the legislature in 1987 wanted to help employees whose benefits were not increased in other legislation enacted in 1981.

The majority opinion's assumption is false, aside from the propriety of a court's supplying its own justification, where the legislature itself has omitted any justification. The plaintiffs here suffered no decrease in benefits compared to other employees in 1981 or 1982. This coordination of benefits statute was a separate bill having nothing to do with the amount of benefits. The opinion below confuses two separate legislative statutes enacted in this period, one of which gave a benefit increase to this Plaintiff Romein. This was Michigan Public Act 357 of 1980. It had nothing to do with coordination of benefits.

The statute gave increases to prior injury cases, such as these plaintiffs; all claimants having accidents between 1965 and 1979 received increased benefits, running from 10.3% to 86.6%. Plaintiff Romein, whose accident was in 1977, received $21 more per week. MCL 418 352. Record Exhibit II-4. (This $21 a week increase was paid from the

state's general fund, not by employers, thus avoiding any issue of retroactivity and impairment of contracts.)

This clear fact destroys the assertion by the majority, its attempt to invent a "rational" reason for the 1987 statute; pre-1981 claimants did get increases in 1981.

Coordination of benefits, the subject here, was passed later, in December, 1981, effective March 31, 1982, in a bill confined to that subject. Michigan Public Act 203 of 1981.

Consequently, the court-supplied assumption to justify the 1987 legislation, that the 1987 legislature wanted to give benefits to pre-1981 claimants who received none, was a false one. No explanation other than this assertion by the court itself is offered of any need or intent, or how the 1987 legislation might meet that need. There is none in any legislative record, and the majority's invented assumption is false.

Amicus submits there is no problem or need described anywhere justifying even a "reasonable exercise of the police power" to justify retroactivity. There is no conflict between any competing constitutional rights requiring a weighing of "rational relationship," nothing which permits a legal challenge to the clearly stated Contract Clause of the U.S. Constitution.

II.

LEGISLATORS MAY ACT ONLY DURING THE PERIOD THEY HOLD OFFICE. A CURRENT LEGISLATURE CANNOT ACT FOR OR BIND FUTURE OR PAST LEGISLATORS WITHOUT VIOLATING DUE PROCESS OF LAW.

Due process of law in various forms is argued in other briefs. This *amicus* will confine itself to a discussion of the temporal time limits on assertions of power by legislators.

As set forth under the Statement of Facts, the 1987 Michigan legislature purported to construe (actually to

change) the "intent" of the 1981 legislature, after the 1981 statute passed through the crucible of judicial construction in 1985. The 1987 statute as enacted simply stated that the 1981 legislature's "intent" differed from that found by the Michigan Supreme Court in *Franks* v. *White Pine Copper Div.* and *Chambers* v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985).

Chief Justice Riley in her dissent points out the ludicrous nature of the 1987 legislators' determining the intent of the 1981 legislators; only 11 of the 26 senators in office in 1981 were still in the senate in 1987, and only 20 of the 62 representatives were still in office in 1987. Thus, there is no basis for the 1987 legislators to assert or change whatever "intent" existed among the 1981 legislators.

It also invades the "time zone" of authority and sovereignty of the 1981 legislature itself by overturning its 1981 vote. This presents the due process question.

Amicus urges the Court to examine an article on this subject, "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity," *1987 American Bar Foundation Research Journal*, beginning on page 379. The author is Professor Eule of the Law School at the University of California at Los Angeles.

Professor Eule explains why a current legislature cannot "rewrite history" by overturning the votes of its predecessor legislators. At p. 445:

> . . . What if, on January 3, the newly elected representatives conducted a "recount" of all legislative voting that had occurred during the preceding two years, substituting the votes of the new representatives for those of their predecessors?
>
> If these recounts were accompanied by a decree that the bills which could no longer muster a majority vote were to be treated as never having been en-

> acted, we would surely conclude that the spirit, if not the letter of the Constitution had been violated.

This is precisely what the Michigan legislature did in 1987. Professor Eule continues:

> The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication.

Again, Professor Eule describes exactly what the 1987 Michigan legislature did, eradicating not only the 1981 vote, but the 1985 Supreme Court decision, too. Professor Eule then examines the reverse situation, prior bills which did not pass:

> A decision that bills defeated by prior legislators can now be enacted and treated as if they had been enacted earlier arguably runs afoul of this same principle. The then-authorized representatives made a choice, and their decision demands recognition of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone.
>
> Just as the delegation of authority does not encompass incursions into the domain of legislatures to come, it does not contemplate contravening the sanctity of the past.

Drawing on this Court's analysis in *Allied Structural Steel* v. *Spannaus*, 438 U.S. 233 (1978) (a case *amicus* has cited on impairment of contracts), Professor Eule poses this question: Assume that the Minnesota legislature, from 1963 to 1974, had defeated pension-vesting legislation, but in 1974, that legislation finally squeaks through, not just for new pension plans, but retroactively to 1963, where such bills had been defeated:

> Doesn't such an enactment invade the exclusive domain of the predecessor legislatures? *Ibid.*, p. 397.

Chief Justice Riley in her dissent, pp. 5-6, quotes extensively from the floor debate of 1981 on this coordination of benefits bill. The remarks of Representatives Cushingberry, Emerson, Vanek, and Kelsey in opposition to its passage expressly recognized the bill's content and its "intent" as it passed.

And, in 1982, Senate Bill 834 proposing to repeal this 1981 vote on coordination of benefits was soundly defeated, a further demonstration of the legislative "intent" to enact and retain this "coordination of benefits" statute. Thus, the content and the "intent" was clearly fixed in 1981, as the Michigan Supreme Court held in 1985. The 1987 legislature can repeal the 1981 statute, but it cannot change the clearly expressed intent of that statute, or deny its enactment.

Amicus submits that the 1987 legislature, consistent with due process of law, did not have the power to rewrite the history of 1981 and 1982 and declare that these clearly recorded actions embodying the content and the "intent" never occurred.

Professor Eule submits that restricting legislatures to the time zone of their authority is part of due process, and "serves as our guide to assessing retroactivity where specific clauses of the Constitution, (*ex post facto*, contract or takings) are not applicable." *Ibid.*, p. 397.

Without this constitutional structure of due process, there is no stability, past transactions are never final, plans and expectations based on stability of law are not allowed to any citizen.

With actions and decisions such as occurred in Michigan, set forth fully and precisely in this record, there is no Rule of Law; when the past is unstable, there are no stable premises permitting citizens to make future com-

mitments. The whims of legislators may control our future, but due process forbids those whims to control our past as well.

CONCLUSION

For these reasons, the National Council of Self-Insurers, as *amicus curiae*, urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

DOUGLAS F. STEVENSON
STEVENSON, RUSIN AND FRIEDMAN, LTD.
10 South Riverside Plaza
Suite 1530
Chicago, Illinois 60606
(312) 454-5110

Counsel for Amicus Curiae

APPENDIX 1

State Workers' Compensation Laws

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Branch of Workers' Compensation Studies

January 1990

TABLE 17. OFFSET PROVISIONS
IN STATE WORKERS' COMPENSATION LAWS

ALASKA

Section 23.30.225(a)—When periodic retirement or survivors' benefits are payable under Title II of the Social Security Act (42 U.S.C., 301 et seq.), the weekly compensation for total disability or death shall be reduced by an amount equal to one-half of the Federal benefits for such week. (b) When a claim has been filed under this chapter, any weekly disability benefits payable shall be offset by benefits in accordance with 42 U.S.C., 401 et seq., by an amount which exceeds 80 percent of the employee's average weekly wage at the time of injury. (c) When employer contributions to a pension or profit sharing plan are used in determining gross earnings and the employee is receiving pension or profit sharing payments, the weekly compensation benefits for total disability and death will be reduced.

Section 23.30.187—Compensation for temporary total disability is not payable during any week in which unemployment compensation benefits are also payable.

CALIFORNIA

Section 4753—Additional compensation for subsequent injuries shall be reduced by any monetary payments from any source, except for a pension or a service-connected disability which was incurred in the U.S. armed forces.

Section 4904—Permits liens to be made against temporary total disability indemnity for any unemployment compensation disability benefits being received.

COLORADO

Sections 8-50-103 and 8-51-101—Benefits for disability in this State shall be reduced by 50 percent and death by 100 percent of any Federal OASDI payments, or the workmen's compensation act of another State or of the Federal Government, or of an employer pension or disability plan.

Section 8-51-101(1)(c)(ii)—Permanent total disability benefits shall be reduced by 50 percent of any Federal OASDI payments received after the claimant reaches the age of 65, or in the case of a claimant who begins to receive employer-paid retirement payments at the age of 65, by an amount determined as a percentage of such benefits.

Section 8-51-101(1)(f)—Weekly temporary and permanent total disability benefits shall be offset by 100 percent of any unemployment compensation benefits received for the same week, with certain exceptions.

DISTRICT OF COLUMBIA

Section 36-308(g)—Weekly compensation benefits are offset if the sum of any Federal Old Age Survivors Insurance benefits, or any employee benefit plans subject to the Employee Retirement Income Security Act of 1974,

or any other employee income maintenance plan which is funded solely by the employer plus such weekly compensation benefits exceeds 80 percent of the employee's average weekly wage.

FLORIDA

Section 440.15(3)(b)(4)—Provides that if an employee is entitled to both wage-loss benefits and social security retirement benefits, the social security retirement benefits will be primary and wage-loss benefits supplementary. The sum of any combined benefits must not exceed the amount of wage-loss benefits which would otherwise be payable.

Section 440.15(9)—Weekly compensation benefits for disability are offset by the amount of any Federal OASDI payments so that the claimant's total benefits do not exceed 80% of his/her average weekly wage.

Section 440.15(10)(a)—No weekly compensation payments are made for temporary or permanent total disability under the workers' compensation law for any week in which unemployment compensation benefits are paid.

Section 440.15(10)(b)—Offsets wage-loss or temporary partial disability benefits by the amount of any unemployment compensation benefit payments.

LOUISIANA

Section 1225—Permanent total disability benefits payable under the Act will be reduced for those recipients who are also receiving Federal OASDI benefits. This reduction is to be made only to the extent that the amount of the combined Federal and State workers' compensation benefits would otherwise cause or result in a reduction of the Federal benefits pursuant to the Social Security Act (42 U.S.C., Section 424a).

Section 1225-B—No compensation will be paid for temporary or permanent total disability or supplemental earnings benefits during any week in which the employee is receiving or entitled to receive unemployment compensation benefits.

MAINE

Section 111-A—Offsets benefits for personal injury or disease under an insured disability or medical payments plan against payments for workers' compensation.

Section 62-A—Reduces benefit payments by the amount of any concurrent unemployment compensation benefits, excluding lump sum settlements and scheduled permanent partial disabilities.

Section 62-B—Reduces total and partial disability benefits by:

(1) Fifty percent of the amount of old age insurance benefits received under the Federal Social Security Act;

(2) The after tax amount of the payments received under an employee benefit plan provided by the same employer, if the employee did not contribute directly to the plan; and,

(3) The proportional amount, based upon the ratio of the employer's contributions to the total contributions, if the employee did contribute directly to the plan.

MARYLAND

Section 36 (1)(a)—Cost-of-living increases for employees who are entitled to compensation for permanent total disability under this section and for disability under the Federal social security act will be reduced to avoid a diminution of the Federal benefits.

MASSACHUSETTS

Section 36 B(1)—No benefit shall be payable for temporary total and permanent total disability for any week in which the employee has received or is receiving unemployment compensation benefits.

Section 36 B(2)—Any unemployment compensation benefits received will be credited against partial disability benefits for the same period or credited against any future partial disability benefits which are or may become payable.

MICHIGAN

Section 418.354—Temporary total disability benefits will be reduced by 50 percent of any Social Security benefits; and by amounts received after taxes under any self-insurance plan, wage continuation plan, pension or retirement plan provided by the employer to which the employee does not contribute.

Section 418.354(1)(f)—Temporary total disability benefits will be coordinated with those from employer contributions to a qualified profit sharing plan where the employer does not provide a pension plan.

Section 418.358—Offsets temporary total, permanent total, and permanent partial disability benefits under the workers' compensation act dollar for dollar by unemployment compensation benefits.

MINNESOTA

Section 176.101, Subdivision 4—After $25,000 is paid for permanent total disability, benefits paid by any government disability program, or any old age and survivors' insurance benefits program are credited against workers' compensation benefits, if such disability benefits are occasioned by the same injury.

Section 176.111, Subdivision 21—Death benefits shall not exceed 100% of the deceased employee's weekly wage at the time of the injury causing his death, when the total weekly government survivor benefits and the state workers' compensation benefits are combined, nor be payable for any week in which the government benefits exceed such percentage.

MONTANA

Sections 39-71-701(2) and 39-71-702(2)—If periodic disability benefits are payable to the worker under the Federal OASDI, weekly temporary total and permanent total disability benefits resulting from both injury and occupational disease shall be reduced by an amount approximating one-half (but not below zero) of the Federal benefit for such week which amount is to be calculated from the date of the social security disability entitlement.

NEW JERSEY

Section 34:15-29—Workers' compensation benefits may be offset against disability pension benefits or payments.

Section 34:15-95.4—Supplemental benefits for permanent total disability and death shall be offset by any Federal survivor or disability benefits, black lung, or disability pension benefits.

Section 34:15-95.5—Reduces permanent total disability or subsequent injury benefits of individuals under age 62 by Social Security benefits where the period of disability began after December 31, 1979.

NEW MEXICO

Section 52-1-70 A&B—Offsets unemployment compensation benefits against total disability benefits. If a worker

is concurrently entitled to both types of benefits, the unemployment compensation benefits shall be primary and total disability benefits shall be supplemental only, and the sum of the two benefits shall not exceed the amount of total disability benefits otherwise payable.

NEW YORK

Section 16(1-c) and (7)—Applies a statutory offset of a sole surviving spouse's compensation by up to 50 percent of his or her social security benefits, if any. Further, provides that in computing the offsets, any increase in benefits under the Social Security Act that occurs after the date of death shall not be considered; and any such offset shall be equally applicable to payments under the Social Security Act which are received retroactively, but shall not apply to increases for such benefits received retroactively.

NORTH CAROLINA

Section 97-42.1—Provides that compensation for temporary total or permanent total disability benefits may be reduced by the amount of any unemployment insurance benefits received for the same period.

NORTH DAKOTA

Section 65-05-08—Offsets partial or total disability benefits of any worker who fails to report wages received from any part-time or full-time employment.

Section 65-05-09.1—The aggregate benefits payable for temporary total or permanent total disability shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half of the benefits payable under Title II of the Social Security Act (42 U.S.C. 423) and will not

be affected by any increase or decrease in Federal benefits. Any escalation of temporary or permanent total disability benefits, which would adversely affect the bureau's right to offset workers' compensation benefits against social security benefits, shall not be applicable to persons whose benefits are offset, as provided for in this chapter.

Section 65-05-09.2—Retirement offset. If a claimant is entitled to permanent total disability benefits and social security retirement benefits under 42 U.S.C. sections 402 and 405, the aggregate wage-loss benefits payable under this title must be determined in accordance with this section. The employee's social security retirement offset must equal forty percent of the calculated ratio of the employee's average weekly wages, as calculated on the commencement of the first, or recurrent, disability to the current State's average weekly wage. Any offset calculated cannot exceed forty percent of the employee's weekly social security retirement benefits. If a claim has been accepted on an aggregate basis and the worker is eligible for social security benefits, the bureau's offset must be proportionally calculated.

OHIO

Section 4123.56—Applies an offset against temporary total disability payments in the event of concurrent and duplicative benefits under an employer funded nonoccupational benefits plan.

OREGON

Section 656.209—Provides for a social security offset against permanent total disability benefits determined and authorized by the Department in each case. Such offset must not result in a reduction of benefits to an amount less than the greater of the workers' compensation bene

fit, the total family benefit under Social Security, or 80% of the average current earnings as determined by Social Security.

UTAH

Section 35-1-67(4)—After the first 312 weeks of permanent total disability payments have been made, future payments will be reduced by the dollar amount of 50 percent of the Social Security retirement benefits received by the employee during the same period.

Section 35-1-68(2)(A)(ii)—Reduces weekly death benefits to wholly dependent spouses after the first six-year period following an employee's death by 50 percent of any Federal social security death benefits.

WASHINGTON

Section 51.32—Reduces temporary and permanent total disability benefits to allow an offset for social security retirement benefits under the Federal OASDI, in a manner similar to Section 51.32.220 below.

Section 51.32.220—Reduces temporary and permanent total disability benefits for persons under age 65 by an amount equal to the benefits payable under the Federal OASDI, under certain conditions.

WISCONSIN

Section 102.44(5)—Reduces disability benefits under this section when the employee also receives social security disability benefits. Combined workers' compensation and social security disability benefits are limited to 80 percent of the employee's average current earnings. However, such benefits may not be reduced to an amount less than the benefits payable under this chapter.

WYOMING

Section 27-14-401(iii)—Prohibits an employee who is receiving unemployment compensation to receive disability benefits under the workers' compensation act.

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1390

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, PETITIONER,

v.

EVERT ROMEIN, ET AL.,
RESPONDENTS

FORD MOTOR COMPANY, PETITIONER,

v.

ARTURO GONZALEZ, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Suite 1500 — North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

DWIGHT H. VINCENT*
J. WALKER HENRY
RACHELLE G. SILBERBERG
CLARK, KLEIN & BEAUMONT
1600 First Federal Building
Detroit, Michigan 48226-1962
(313) 965-8300
Attorneys for Amici Curiae

April 19, 1991

* Counsel of Record

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
PRELIMINARY STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
I. Employers Who Relied On A Valid Statute As Interpreted By The State's Highest Court Expect That Obligations Met Under Existing Law Will Not Be Retroactively Reopened	5
II. Retroactive Increases In Workers' Compensation Liability Will Raise Insurance Costs For All Michigan Employers, To Their Competitive Disadvantage	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
Chambers v. General Motors Corp., 422 Mich. 636, 375 N.W.2d 715 (1985)	3
Chicot County Drainage Dist v. Baxter State Bank, 308 U.S. 371 (1940)	6
Franks v. White Pine Copper, 422 Mich. 636, 375 N.W.2d 715 (1985)	3
Lemon v. Kurtzman, 411 U.S. 192 (1973)	5, 6, 9
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	6
Poulos v. New Hampshire, 345 U.S. 395 (1953)	5
Smith v. Allwright, 321 U.S. 649 (1944)	7
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	5
STATUTES:	
Mich. Comp. Laws §418.354	2, 3
MISCELLANEOUS:	
SB67, introduced May 7, 1987, 1987 Journal of the House 1062-1063	4

No. 90-1390

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION,
PETITIONER,

v.

EVERT ROMEIN, ET AL.,
RESPONDENTS

FORD MOTOR COMPANY,
PETITIONER,

v.

ARTURO GONZALEZ, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

The National Association of Manufacturers ("NAM") is an association of approximately 12,500 companies and subsidiaries that together produce the vast majority of this nation's manufactured goods and employ eighty-five percent of all manufacturing workers in the United States, many of whom are potentially affected by the issues addressed herein. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Michigan Manufacturers Association ("MMA") is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michigan Legislature, and State agencies. MMA appears before this Court as a representative of approximately 2,700 private employers who employ more than 1,000,000 employees, all of whom are potentially affected by the issues presently before this Court. MMA is also an employer of workers in the State of Michigan and has an interest in this case both as an employer and as a representative of employers affected by the issues decided herein. NAM and MMA represent the interests of their member-employers through various means including, as here, appearances as *amici curiae* in cases of major concern.

The National Association of Manufacturers and Michigan Manufacturers Association submit this brief as *amici curiae*, with the written consent of all parties, in support of the Petition for a Writ of Certiorari in order to alert the Court to the broad significance of this dispute.

PRELIMINARY STATEMENT

These cases focus on the Michigan Legislature's May 1987 amendment of Section 354 of Michigan's Workers' Disability Compensation Act, 1981 PA 203, MCL 418.354. Section 354, originally enacted in 1981, was intended to reduce employer liability for workers' compensation benefits to the extent that they can be coordinated with other employer-funded, wage-replacement sources. After Section 354 became effective on March 31, 1982, a bill was introduced in the 1982 Michigan Legislature to limit coordination to workers injured after the effective date of the newly enacted provision. That bill was defeated. *See* Appendix to

Petition for Writ of Certiorari at pp 36a-37a (Riley, J., dissenting). Litigation subsequently ensued over the applicability of Section 354's coordination provision to previously injured claimants. In 1985, the Michigan Supreme Court unanimously held that the unambiguous wording of Section 354 permitted coordination of benefits for all workers' compensation claimants, regardless of the date of injury.[1]

In 1987, however, the Michigan Legislature enacted an amendment to the Workers' Compensation Statute designed to overrule the Michigan Supreme Court's decision in *Chambers* and to disallow coordination of benefits for claimants who had been injured prior to the 1981 statute's effective date of March 31, 1982. The 1987 amendment effectively repealed the 1981 coordination provision retroactively by requiring employers to pay refunds, with interest, to employees whose benefits had been coordinated during the five-year period that the 1981 statute was in effect. *See* Appendix to Petition for Writ of Certiorari at pp 90a-92a. At issue in these consolidated cases is the constitutionality of the 1987 amendment.

Those employers who began, prior to the *Chambers* decision, to coordinate workers' compensation benefits with other employer-funded wage-replacement sources did so in the belief that the statutory language clearly accorded them that right and with the knowledge that a 1982 legislative effort to withdraw that right had been defeated. Moreover, once *Chambers* was decided, and Michigan's highest court had unanimously held that Section 354 "clearly and unambiguously permitted coordination of benefits regardless of when the injury occurred," the actions of those employers and insurance carriers who had coordinated benefits were vindicated.

In its decision below, the Michigan Supreme Court rejected petitioners' contentions that the 1987 amendment violated due

---

[1] *Chambers v. General Motors Corp., decided sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715, *reh'g denied sub nom. Chambers v. General Motors Corp.*, 424 Mich. 1202, 389 N.W.2d 685 (1985).

process and unconstitutionally impaired contractual arrangements between the employers and their employees. The majority was unpersuaded that General Motors' and Ford's reliance on the 1981 coordination provision was reasonable, ostensibly in part, because employers "were on notice of the legislative debate regarding the proposed changes in the law." *See* Appendix to Petition for Writ of Certiorari at pp. 11a-12a. However, Michigan employers had no notice of the possibility of retroactive liability until the eve of the 1987 statute's enactment into law on May 14, 1987. The first bill providing for retroactive liability, SB 67 (H-2), was not introduced until May 6, 1987, and was not adopted until the following day. *See* 1987 Journal of the House, 1062-1063.

Although these consolidated cases address the constitutional validity of specific amendments to Michigan's Workers' Disability Compensation Act, the disposition of this litigation will impact virtually all legislative and judicial activity in the State of Michigan. In unprecedented "superseding legislation," the Michigan Legislature declared actions that were legal and complete when they were taken to be — by virtue of the Legislature's own statutory construction — incomplete and illegal. By redefining employers' entirely proper payment of workers' compensation benefits from 1982 until 1987 as "underpayments," the Michigan Legislature has ordered employers to pay "retroactively" amounts that were never owed. The ramifications of such retrospective restructuring of financial obligations may be extensive if the rationale of the Michigan Supreme Court's decision is imputed to other financial obligations. Michigan employers, particularly small businesses, and their counterparts in sister states rely upon the stability of the law in planning and conducting business. If this reliance on existing law is disregarded, employers will be subject to unpredictable changes in the cost of doing business that will threaten their ability to compete effectively in international markets and, in some cases, threaten their ability to survive in American markets.

The sequence of legislative and judicial events that impacted the two major employers that are parties to these consolidated cases also impacted scores of small businesses that are not self-insured for purposes of workers' compensation. The outcome of this litigation may have the most immediate and serious effect upon those employers who must meet the demands of the insurance marketplace, demands that can be expected to rise significantly.

REASONS FOR GRANTING THE PETITION

I. EMPLOYERS WHO RELIED ON A VALID STATUTE AS INTERPRETED BY THE STATE'S HIGHEST COURT EXPECT THAT OBLIGATIONS MET UNDER EXISTING LAW WILL NOT BE RETROACTIVELY REOPENED.

Michigan employers rely on the stability of the law when they hire employees and make commitments to them. They know that their workers' compensation insurance premiums will be calculated based on the number of their employees and their loss experience, which includes not only the number of individual claims, but also the dollar amount of benefits paid on their behalf. Under the constitutional analysis presented in the certiorari petition, this reliance interest of Michigan employers is protected by the Contract Clause's prohibition against impairment of "settled expectations." It is also protected by the Due Process Clause's requirement that a legislature "take into account the possibilit[y] that . . . conduct may have been taken in reliance upon the current state of the law . . ." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

Employers who complied with a valid statute should be secure in the knowledge that their action, correctly taken under color of that law, will not be later undone. As Chief Justice Burger stressed in this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), "[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions

and in shaping their conduct." This "fact of legal life," which "underpins" the doctrine of nonretroactivity, compelled the Court to permit reimbursement to Pennsylvania parochial schools for secular educational services previously rendered under a statutory scheme that was ultimately found unconstitutional. *Id.* 411 U.S. at 199. Your *amici curiae* submit that the same notions of fairness and practical reality that recognize reliance on a statute that is subsequently found invalid also apply to a statute that is subsequently amended.

Michigan employers and insurance carriers similarly rely upon decisions of the state's highest court. Indeed, the fundamental principle of *stare decisis* mandates the application of prior decisions of a state's highest court to the same facts in other cases with different parties. Interpretation of a law by a state's highest court becomes part of the law as definitely as though it were written into that law. *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953). Reliance on judicial determinations provides uniformity and predictability both in the legal process and in the community at large. Lawyers and jurists advise citizens and businesses of their rights and obligations under existing law. The underlying purpose of the *stare decisis* principle is to furnish a clear guide for individuals' conduct, to enable them to plan their affairs "with assurance against untoward surprise" and to maintain "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

In the rare case where changes in social conditions and circumstances justify application of a new rule of law, the courts are empowered to change the law, by "the announcement of a new remedial rule to effectuate well-established primary rules of behavior." *Id.* Even when announcing a new rule of law, however, this Court has declined to attach retroactive effect where there has been good faith reliance on what appears to be correct interpretation of a statute. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

Under our legal system, even judicial reversals of existing law are permitted only in those rare instances where changed conditions make the application of the old rule unjust. Other than in those instances, citizens, lawyers and judges rely on the continuity and predictability of the law. Justice Roberts once observed that frequent reversals of earlier decisions would bring adjudications of the Supreme Court "into the same class as a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944). This principle should apply with even greater force when reversal is accomplished through legislative rather than judicial action. The reliance interest implicated in that instance is not merely in current law, but also in the fact that, under a tripartite form of government, it is the task of the judiciary to finally declare what the law is.

Even where "significant restrictions apply," passengers rely on the fact that their tickets for future passage will be valid for the purpose for which they were issued. Under our legal system, we must be able to rely without penalty on the validity and finality of adjudications of the state's highest court. We submit that when a legislature acts contrary to that principle by overruling a final adjudication as it applies to pre-effective date transactions, it violates the most fundamental of reliance interests and therefore exceeds the scope of its power as limited by the Due Process and Contract Clauses of the United States Constitution.

II. RETROACTIVE INCREASES IN WORKERS' COMPENSATION LIABILITY WILL RAISE INSURANCE COSTS FOR ALL MICHIGAN EMPLOYERS, TO THEIR COMPETITIVE DISADVANTAGE.

The impact of the Michigan court's decision in these consolidated cases involving two large corporations will be significant for smaller businesses in the state. The effect of the Michigan court's decision for compensation carriers will be increased uncertainty with respect to projected risks and liabilities. Workers' compensation carriers will, of necessity, increase premiums to take into

account not only the risks and liability levels of which they are aware, but also the possibility of future retroactive increases in those liability levels. As an immediate result, workers' compensation coverage will become either extremely (in certain cases prohibitively) expensive, or unavailable. This will make insurance unnecessarily expensive and put Michigan businesses at a distinct competitive disadvantage.

Although the Michigan business community at large cannot ascribe a known dollar figure to its reliance, we can expect that the affordability/availability crisis that will result from the Michigan Legislature's action may further endanger some small manufacturers that are already experiencing the effects of an economic recession. As the costs of workers' compensation insurance rise, Michigan businesses will have fewer resources out of which to fund employees' wages and fringe benefits. If workers' compensation obligations remain forever contingent upon subsequent legislation retroactively applied, businesses will be unable to calculate their fixed costs for any period of years or to plan for the increased demands of the insurance marketplace. We submit that the Contract and Due Process Clauses of the Constitution were intended to prevent such consequences.

CONCLUSION

The questions raised by the present Petition are hard ones:

> The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of the courts, state and federal . . . "

Lemon, 411 U.S. at 198. Because this dispute presents a difficult issue of major significance to industry in this country, the National Association of Manufacturers and Michigan Manufacturers Association urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

CLARK, KLEIN & BEAUMONT

By: DWIGHT H. VINCENT*
J. WALKER HENRY
RACHELLE G. SILBERBERG
1600 First Federal Building
Detroit, Michigan 48226-1962
(313) 965-8300
Attorneys for Amici Curiae

* Counsel of Record

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
National Association of
Manufacturers
1331 Pennsylvania Avenue, N.W.
Suite 1500 — North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

Dated: April 19, 1991

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1390

In The

Supreme Court of the United States

October Term, 1990

GENERAL MOTORS CORPORATION,

Petitioner,

v.

EVART ROMEIN, ET AL.,

Respondents.

FORD MOTOR COMPANY,

Petitioner,

v.

ARTURO GONZALEZ, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICI CURIAE* MICHIGAN ASSOCIATION OF INSURANCE COMPANIES, ALLIANCE OF AMERICAN INSURERS, CITIZENS INSURANCE COMPANY OF AMERICA AND MICHIGAN MUTUAL INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY

DONALD S. YOUNG
Counsel of Record
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560
Attorney for Amici Curiae

Of Counsel
KATHLEEN McCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the 1987 amendment to the Michigan Worker's Disability Compensation Act, which retroactively imposes on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds after the insurers fully had discharged their policy obligations under applicable law, violate the Contracts Clause (art. I, § 10) of the United Sates Constitution?

2. Does the 1987 Michigan statute retroactively imposing on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds after the insurers fully had discharged their policy obligations under applicable law, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

THE PROVISION AND PRICING OF WORKER'S COMPENSATION INSURANCE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THE CONTRACT CLAUSE BARS THE MICHIGAN LEGISLATURE FROM RETROACTIVELY IMPOSING ON INSURERS ADDITIONAL LIABILITIES TO THEIR INSUREDS LONG AFTER THE INSURERS FULLY HAD DISCHARGED THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING LAW 8

A. Express Contractual Rights Of Insurers Under Michigan Worker's Compensation Policies Are Protected By The Contract Clause 9

B. The Impairment Of Insurers' Express Contracts With Their Insureds Violates The Contract Clause 11

1. The 1987 statute substantially impairs contract rights 11

TABLE OF CONTENTS – Continued

Page

2. The Michigan court misapplied this Court's holdings on the "legitimate purpose" and "reasonable means" requirements in Contract Clause cases 13

II. THE 1987 LEGISLATION VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IMPERMISSIBLY DISTURBS THE SETTLED EXPECTATIONS OF THE PARTIES TO WORKER'S COMPENSATION INSURANCE CONTRACTS AND IS MANIFESTLY UNFAIR TO INSURERS 16

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 11, 12, 14, 15

Chambers v. General Motors Corp., 422 Mich. 636, 375 N.W.2d 715 (1985) 10, 19

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 11

Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) 11

Romein v. General Motors Corp., 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990) 1, 2, 12, 14, 16

STATUTES:

Mich. Comp. Laws Ann. § 418.352 (West 1990) 14

Mich. Comp. Laws Ann. § 418.354 (West 1990) .. *passim*

Mich. Comp. Laws Ann. § 418.611 (West 1990) 4

Mich. Comp. Laws Ann. § 500.2301 (West 1983) 5

Mich. Comp. Laws Ann. § 500.2403 (West 1990) 19

Mich. Comp. Laws Ann. § 500.3101 – § 500.3179 (West 1990) 18

OTHER AUTHORITY:

Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1) (1980) 6, 19

Amici Curiae Michigan Association of Insurance Companies, Alliance of American Insurers, Citizens Insurance Company of America and Michigan Mutual Insurance Company (collectively "*Amici Curiae*" or "*Amici*") submit this Brief in Support of the Petition for a Writ of Certiorari of General Motors Corporation and Ford Motor Company.

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Citizens Insurance Company of America ("Citizens") and Michigan Mutual Insurance Company ("Michigan Mutual") are insurers providing, *inter alia*, worker's compensation and employer's liability insurance to employers in Michigan that are required by law to secure the payment of benefits to their employees who are injured on the job. Citizens and Michigan Mutual are directly affected by the Michigan legislature's 1987 amendment to § 354 of the Worker's Disability Compensation Act, Mich. Comp. Laws Ann. § 418.354 (West 1990), which amendment retroactively imposed liability on Citizens and Michigan Mutual for the payment of additional worker's compensation benefits on behalf of their insureds years after these insurers had fully discharged their contractual duties to the insureds. If this Court lets stand the Michigan Supreme Court's decision finding the 1987 amendment constitutional,[2] Citizens and Michigan Mutual will be required to expend between them

[1] *Amici* have filed with the Court Clerk Petitioners' and Respondents' written consents to the filing of this Brief.

[2] *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

approximately $2.3 million to satisfy their newly created obligation to pay worker's compensation benefits on behalf of past and present insureds.

Amici Curiae Michigan Association of Insurance Companies ("MAIC") and Alliance of American Insurers ("AAI") are insurance industry trade associations whose members include insurers that sell, among other lines of insurance, worker's compensation coverage in Michigan. The MAIC was organized in 1971 and the AAI was organized in 1922. Both organizations were formed to promote the interests of their member insurers and to achieve this objective through representation of its members in litigation, before legislative bodies, and through research and public information. Members of both of these organizations are directly affected, in the same manner as Citizens and Michigan Mutual, by the 1987 amendment to § 354 and by the state Supreme Court's decision in *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

Additionally, *Amici Curiae* are concerned more generally by the Michigan Supreme Court's acquiescence in the state's retroactive creation for insurers of new liabilities under completed contracts. The fair pricing of insurance is an inherently uncertain process because insurers are permitted to price their policies utilizing only their projected future costs, but not past or retroactively-imposed costs. The Michigan Supreme Court's decision permitting the legislature *retroactively* to change at its whim the benefit level payable under law – which is a key component of the insurer's costs for state-mandated insurance coverages like worker's compensation, automobile liability and automobile no-fault – has exacerbated that

uncertainty significantly. This added measure of uncertainty will make it substantially more difficult, if not impossible, for insurers to make accurate business decisions regarding the fair pricing of insurance. As a result, Citizens, Michigan Mutual and other insurers writing worker's compensation and other required coverages in Michigan may cease providing this protection and find other sources for their surplus. The resulting hardship on Michigan insureds could be devastating.

The Contract Clause and Due Process arguments raised in the Petition of General Motors Corporation and Ford Motor Company apply with equal or greater force to insurers like Citizens, Michigan Mutual and the members of MAIC and AAI. Workers' compensation insurers in Michigan fully satisfied their express contractual obligations to their insureds during the period from March 31, 1982 (the date insurers first were allowed to coordinate worker's compensation benefits with other retirement benefits) through May 14, 1987 (the effective date of the 1987 amendment requiring insurers to pay additional benefits, retroactive to March 31, 1982, to workers injured prior to that date). The Michigan legislature's attempt to impose greater liabilities on insurers than they assumed and discharged under their contracts during the relevant period works a direct and unconstitutional impairment of insurers' settled contract rights. Also, the 1987 statute deprives insurers of due process by impermissibly disturbing settled expectations and long-completed transactions.

THE PROVISION AND PRICING OF WORKER'S COMPENSATION INSURANCE

The economy of Michigan has been heavily industrialized for most of this century. As a result, both

economically and socially, worker's compensation is perhaps the most critical of all lines of insurance in Michigan. Ever since the first comprehensive worker's compensation act was adopted in the state in 1912, Michigan workers and their dependents have been entitled by statute to the immediate and certain payment of wage loss, survivors' loss and medical benefits for injuries and deaths arising out of and in the course of their employment. Moreover, claims that arise under the worker's disability compensation system in Michigan are not subject to many of the common law defenses – like comparative or contributory negligence and assumption of the risk – which, until adoption of no-fault worker's compensation laws in the state, prevented many injured workers from receiving any benefits for wage loss, survivors' loss and medical expenses resulting from on-the-job injuries.

Employers that are subject to the Michigan Worker's Disability Compensation Act are required by law to secure for all of their employees the payment of these statutorily-granted benefits. Mich. Comp. Laws Ann. § 418.611 (West 1990). Some very large employers like the Petitioners herein secure their obligation to pay worker's compensation benefits to their employees by becoming authorized self-insurers. All other employers, however, *must* secure this obligation by purchasing policies of insurance from companies which agree, and are authorized by the state, to write this line of business in Michigan. *Ibid.* Because obtaining worker's compensation insurance is mandatory in Michigan (except for those few employers who are granted the privilege of self-insuring), insurers who write this business in the state are required to insure every employer seeking such coverage. They may fulfill this obligation either by contracting directly

and voluntarily with the employer, or by providing coverage through the Michigan Worker's Compensation Placement Facility. The Facility is an insurer of last resort in which each insurer authorized to write worker's compensation insurance in Michigan must participate as a condition of its authority to transact such insurance in the state. Mich. Comp. Laws Ann. § 500.2301 (West 1983).

Insurance is one of only a few products of which the seller's actual cost is unknown when the product is sold. When a worker's compensation insurer issues a policy to cover losses in a future period and charges a premium therefor, that insurer merely is estimating its ultimate *future* cost to pay (1) claims arising under the policy, (2) claims-related expenses and (3) overhead and other underwriting expenses. Thus, with the exception of a small minority of policies which are retrospectively-rated, insurance premiums are prospective only.[3] An insurer does not – indeed, it *cannot* – attempt to recover past losses and expenses through a premium for a policy issued to cover a future period. Once an insurer incurs a covered loss, if the premium charged for the period in which the loss was incurred is inadequate to cover it, the insurer cannot later recoup that loss. Michigan Insurance Bureau Casualty Insurance Rate Rules 5(1), 6(1) & 7(1),

---

[3] With a retrospectively-rated policy, the insurer and insured agree that the policy premium will be determined after the close of the policy period on the basis of actual loss data. Even then, however, once the policy premium is determined, it cannot later be re-determined because of a retroactive change in the insurer's costs. Retrospectively-rated policies comprised only 1.06% of all worker's compensation policies sold in Michigan in 1988, the latest full year for which such data is available from the Michigan Insurance Bureau.

Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1)(1980). It is, therefore, critical to the fair pricing of worker's compensation and other insurance that insurers have a stable basis from which to estimate the costs of paying claims and expenses under the coverage provided.

The claims cost component of insurance pricing is comprised of three factors: claim frequency (the number of claims occurring during a given policy period), claim severity (the type of injury suffered, e.g., a back injury or loss of the industrial use of a limb) and the level of benefits which the insurer must pay for a covered claim. Claim frequency and claim severity are, of course, impossible for either the insurer or the insured to know in advance of the time period covered by the insurance policy. Only long after the policy period has ended can the contracting parties know how many claims occurred and how severe those claims will be.

As a result, insurers estimate future claim frequency and severity by examining historical claims data and attempting to project future costs from the historical information. Making this task more difficult is the fact that claim frequency and severity can vary from year to year, sometimes dramatically. The process of estimating frequency and severity for future periods is, at best, inexact.

With respect to state-mandated insurance coverages like worker's compensation, automobile liability and automobile no-fault, the third element of claim costs – the level of benefits which a claimant may recover – is (or at least it should be) relatively more stable than the first two elements because the benefit level is set by law. *Amici Curiae* do not contest the state's power *prospectively* to

change and therefore affect future benefit levels. Because insurance premiums are charged prospectively, a forward-looking change in benefit levels would not materially affect insurers' ability to price coverages fairly. Insurers and insureds still can estimate the third element of future insurance claim costs with a greater degree of accuracy and certainty than they can estimate the first two elements.

Where, however, the state may *retroactively* increase insurers' liability by effecting changes in benefit levels for periods long-since closed, the already uncertain process of projecting future costs is made even more uncertain. The sole element of claim cost that remained relatively stable – benefit levels – no longer would be available as a means of allowing insurers to price their product fairly to themselves and their insureds.

SUMMARY OF ARGUMENT

Just as surely as the Michigan legislature's 1987 amendment to § 354 of the worker's compensation law impairs Petitioners' contractual relationships with their employees, this amendment also directly and substantially impairs the express contracts of worker's compensation insurers and their insureds. Moreover, this severe contractual impairment is not necessary to correct a general social problem. To the contrary, the contractual impairment accomplished through the 1987 statute benefits only a discrete class of persons, and does so through means which are not necessary to achieve the legislature's stated objectives.

The 1987 amendment to § 354 violates the Due Process Clause by offending notions of substantial fairness

with respect to the settled expectations of worker's compensation insurers. Insurers were entitled to and did reasonably rely, in the ordering of their business affairs, on their satisfaction of policy obligations under existing law. The state should not be permitted to thwart that reasonable reliance by imposing *five years* of retroactive liability for contractual obligations which already had been satisfied, merely because the legislature believed that workers injured before 1982 were not receiving as much in worker's compensation benefits as persons injured after 1982. The impact of the Michigan Supreme Court's decision on insurers' reasonable expectations, and on the inherent uncertainty in the prospective pricing of worker's compensation and other lines of insurance, could drive insurers out of the Michigan insurance market. The resultant lack of insurance, and the higher premium charged for what coverage would be available, would cause substantial hardships throughout the state and national economies.

ARGUMENT

I. THE CONTRACT CLAUSE BARS THE MICHIGAN LEGISLATURE FROM RETROACTIVELY IMPOSING ON INSURERS ADDITIONAL LIABILITIES TO THEIR INSUREDS LONG AFTER THE INSURERS FULLY HAD DISCHARGED THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING LAW.

There can be no doubt that the 1987 amendment to the Michigan worker's compensation statute impairs express contract rights and obligations that are entitled to protection under the Contract Clause of the United States Constitution. The Michigan legislature, with the blessing

of the state Supreme Court, has *reopened* claims arising under insurers' policy contracts with their insureds, which claims were discharged pursuant to the unambiguous language of the policies themselves and existing law. The Michigan Supreme Court clearly misapplied this Court's Contract Clause decisions in finding that the 1987 amendment to § 354 is constitutional.

A. Express Contractual Rights Of Insurers Under Michigan Worker's Compensation Policies Are Protected By The Contract Clause.

Amici Curiae support and adopt Petitioners' arguments, at pages 10-23 of their Petition, that the 1987 amendment to Michigan's Worker's Disability Compensation Act violates the Contract Clause. Beyond the statute's impairment of implied provisions in contracts between employers and their employees, however, the 1987 amendment in fact substantially and directly impairs *express written* contracts between worker's compensation insurers and their insureds.

The following standard policy language is expressly incorporated into nearly every, if not every, worker's compensation insurance policy issued in Michigan, including those issued by Citizens, Michigan Mutual and most members of the MAIC and AAI who write worker's compensation insurance in the state (a copy of Michigan Mutual's worker's compensation policy appears in the Appendix to this Brief):

> WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY
>
> In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.
>
> * * *

PART ONE –
WORKERS COMPENSATION INSURANCE

* * *

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

The policy defines "workers compensation law" as

the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period.

Amici and other insurers who paid coordinated worker's compensation benefits in Michigan on behalf of their insureds from March 31, 1982 through May 14, 1987 surely have satisfied all of their obligations under this express policy language. Insurers promptly paid worker's compensation benefits on behalf of their insureds as those payments came due. Moreover, those payments properly were coordinated under the state's worker's compensation law, as that law was interpreted by the Michigan Supreme Court in *Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985). Thus, as the insurers made these payments, they fully satisfied their express contractual duty to "pay promptly when due the benefits required of [their insureds] by the workers compensation law," which law included "amendments to that law which [were] in effect during the policy period."

It is beyond peradventure that the express promises contained in the insurance policy contracts under which worker's compensation insurers paid benefits from March 31, 1982 through May 14, 1987 fall within the class of "contracts, executed or executory, whether between individuals or the state and others" which is protected

from impairment by the Contract Clause. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). *Amici Curiae* argue below that the 1987 amendment to § 354 impermissibly impairs those contractual rights.

B. The Impairment Of Insurers' Express Contracts With Their Insureds Violates The Contract Clause.

The Michigan Supreme Court erred in finding § 354 constitutional under the Contract Clause because it misapplied the three-part balancing test which this Court recently has applied to legislation challenged under the Contract Clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). This Court should review and reverse the state court's decision because the 1987 amendment substantially and impermissibly impairs express contractual obligations between worker's compensation insurers and their insureds.

1. The 1987 statute substantially impairs contract rights.

The "threshold inquiry" under the three-pronged test (*Energy Reserves Group, Inc., supra* at 411) is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). As this Court stated in *Spannaus*:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245.

Common sense and the plain language of the standard worker's compensation policy compel the conclusion that the 1987 amendment works a substantial impairment of insurers' policy contracts with their insureds. Just as the Minnesota statute which this Court struck down in *Spannaus* "substantially altered" the petitioner's contractual relationship with its employees "by superimposing obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake" (*Id.* at 240), the 1987 amendment to § 354 substantially changes the nature of the relationship which existed when insurers entered contracts with their insureds and later discharged their obligations thereunder. Where insurers had satisfied their liabilities to their insureds between March 31, 1982 and May 14, 1987, Michigan's legislature retroactively changed those liabilities and thereby altered fundamentally the contractual duties that insurers had undertaken and met.

The Michigan Supreme Court believed that there is no substantial impairment in this case because the 1987 statute does not eliminate the "basic benefit" *to employers* of the worker's compensation scheme – immunity from tort suits. 436 Mich. at 534. Manifestly, this argument is not applicable to the express contractual relationship between a worker's compensation insurer and its

insured. That relationship is governed solely by the terms of the policy contract itself and the worker's compensation law in effect when the policy's obligations are met. Clearly, the 1987 Michigan statute leaves nothing of the benefit for which the insurer contracted with its insured.

The worker's compensation insurer should be able to find comfort in the stability that results from having fully discharged, consistent with then-existing law, the policy obligations for which it collected premiums from its insured. As a result of the 1987 statute and the Michigan Supreme Court's decision below, however, the insurer now finds that the express provisions of its policy contract mean nothing because the state, years after the policy obligations lawfully were met, may retroactively change those provisions and impose *additional* liabilities under the executed contract. The 1987 amendment to § 354 has imposed a liability on worker's compensation insurers that was totally unexpected when the policy contracts were in effect, premiums were collected and claims were paid and discharged under prior law. More important, this additional obligation expressly was never agreed to by *either* the insurer or the insured. Both parties to the insurance contract had settled expectations of finality when payments were made thereunder. The Michigan legislature upset those expectations, thus working a severe impairment of the parties' contractual relationship.

2. The Michigan court misapplied this Court's holdings on the "legitimate purpose" and "reasonable means" requirements in Contract Clause cases.

The Michigan Supreme Court engaged in only minimal scrutiny of amended § 354. After deciding that

"[t]here is a significant state interest in protecting the rights of disabled employees to receive the full compensation intended by the Legislature . . . " (436 Mich. at 535), the court found amended § 354 valid because the state "could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 536.[4] Although it conceded that the means chosen by the state to achieve its objectives involved the retroactive imposition of additional liabilities under completed transactions, the court found these means "reasonable" because "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Such a low level of scrutiny plainly is insufficient under this Court's decisions. Because the impairment of insurers' contracts which the amendment to § 354 creates is nothing short of "severe," the statute must be subjected to the "careful examination of [its] nature and purpose" which this Court required in *Spannaus*. 438 U.S. at 245. It is not enough that the 1987 statute is shown to satisfy the more deferential "rational relationship" standard that is applied to minimal intrusions into contractual relationships. Rather, amended § 354 cannot stand unless it is

---

[4] The legislature did, however, create in 1980 a state-funded weekly compensation supplement for persons who were injured between September 1, 1965 and December 31, 1979. Mich. Comp. Laws Ann. § 418.352 (West 1990). This state-funded supplement entitles eligible employees to receive up to the same weekly compensation as persons injured after January 1, 1982. Mich. Comp. Laws Ann. § 418.352(6) (West 1990).

"necessary to meet an important general social problem." *Id.* at 247. The 1987 amendment does not even come close to satisfying this standard.

First, it is doubtful that the 1987 statute actually was intended to address "an important general social problem." Instead, the plain language of the amendment suggests that like the Minnesota statute challenged in *Spannaus*, the amendment to § 354 "has an extremely narrow focus" (*Id.* at 248), benefitting only that class of persons whose receipt of duplicative benefits prior to 1982 prompted the legislature to require coordination of benefits in the first place. "Thus, this law can hardly be characterized . . . as one enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248-249.

Second, even assuming that the legislature had a legitimate interest in preserving worker's compensation benefits for employees injured before 1982, it flatly cannot be said that the 1987 statute's retroactive imposition of liability on insurers – and the accompanying destruction of their completed contracts – was necessary to promote that interest. As pointed out by Petitioners, the 1987 amendment to § 354 did not benefit all employees injured prior to 1982. Instead, the statute expressly benefits persons with pre-1982 injuries *only* if they can "double-dip into worker's compensation and retirement benefits." Petition, p. 20. If the Michigan legislature had wanted in 1987 to protect benefit levels for all employees injured prior to 1982, it rationally – and constitutionally – could have done so by making persons injured between January 1, 1980 and December 31, 1981 eligible for the weekly

compensation supplement provided under § 352.[5] It would not, under those circumstances, have been necessary to impair insurers' contracts with their insureds.

Indeed, the Michigan Supreme Court's assertion that the 1987 statute is reasonable because it "imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute" (436 Mich. at 536) asks and answers the wrong question. Under this Court's Contract Clause cases, the proper inquiry is *not* what degree of retroactive liability is necessary to achieve the state's objectives, but instead whether *any* retroactive undoing of completed contracts is necessary. Here, the Michigan legislature rationally could have achieved its objectives by means other than upsetting already completed transactions. The 1987 statute cannot, therefore, pass constitutional muster.

II. THE 1987 LEGISLATION VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IMPERMISSIBLY DISTURBS THE SETTLED EXPECTATIONS OF THE PARTIES TO WORKER'S COMPENSATION INSURANCE CONTRACTS AND IS MANIFESTLY UNFAIR TO INSURERS.

Petitioners' analysis under the Due Process Clause is correct. Petition, pp. 24-30. Moreover, this analysis is especially applicable to *Amici's* unique interest in the protection of their vested contractual rights.

Just as surely as the Michigan Supreme Court allowed the state legislature retroactively to *increase* benefit levels for worker's compensation recipients who were injured before March 31, 1982, its decision equally would

---

[5] *See* note 4 *supra*.

permit the state to impose retroactive *decreases* in benefit levels and require injured workers to reimburse employers and their insurers for "overpayments" made many years earlier. It is manifestly unfair, under either circumstance, to permit the state to upset insurers' expectations regarding the cost of insurance for periods long-since closed.

If the Michigan court's decision is allowed to stand, the resulting hardship on insurers, insureds and ultimately, Michigan workers could be enormous. This result flows directly from the inherently uncertain nature of insurance pricing. The price of an insurance policy reflects the insurer's estimate only of the anticipated *future* cost of providing the coverage. Most business entities can recover past losses by building those losses into the price of products which they sell in the future. An insurer, however, cannot recoup through the price of its insurance policy – which policy is issued to cover claims occurring during a future period – losses which arose in past policy periods.

If benefit levels for state-mandated coverages like worker's compensation can retroactively be changed – upward or downward – at the state's whim, there will be no stability in the pricing of worker's compensation insurance and thus no basis for insurers to estimate accurately the future cost of providing protection to their insureds. As a result of the Michigan court's decision herein, an insurer pricing a worker's compensation policy to be issued in 1991, based on benefit levels set by law for claims paid in 1991, will have no assurance that in the year 2001 the state will not retroactively impose additional liabilities for claims paid under the 1991 policy.

If worker's compensation insurers cannot price their product with any reasonable degree of confidence that they can recover even their actual cost of providing the product – much less recover a reasonable return for providing the coverage – they may simply cease writing that insurance and look to other sources in which to invest their surplus. The potential adverse impact on the availability of this line of insurance in Michigan is both obvious and substantial.

Worker's compensation is not the only line of insurance which could be affected adversely by the unfairness of the Michigan legislature's 1987 act. For any insurance coverage in which benefit levels are established by the state – which, in Michigan, includes no-fault automobile insurance[6] – the state's power to effect a retroactive alteration of liabilities by changing benefit levels for past periods removes the one source of stability contributing to the fair pricing of the insurance product. Insurers who do not feel confident that they will be able to recover their future costs, regardless of the premium they charge, may cease writing these lines of business in the state, making such coverage less available for consumers, and then available only at significantly higher premiums.

Even if insurers do not actually cease writing state-mandated coverages as a result of the uncertainty caused by the indiscriminate retroactive use of the legislative power, the increased prices insurers are likely to charge for their policies to cover this uncertainty would work a

[6] Mich. Comp. Laws Ann. § 500.3101 – § 500.3179 (West 1990).

significant hardship on insureds.[7] The ripple effect of this uncertainty through Michigan's (and, indirectly, the nation's) economy could be quite substantial.

The manifest unfairness of the 1987 amendment becomes plainly apparent when the Court considers insurers' substantial and perfectly reasonable reliance on (1) the March 31, 1982 act which permitted coordination of worker's compensation benefits with other retirement benefits and (2) the Michigan Supreme Court's authoritative interpretation of that act in the *Chambers* case. Insurers paid worker's compensation claims *as required by the plain language of their policies and existing law.* They were entitled to believe that they fully had satisfied their obligations to their insureds, and to rely on this belief in conducting their subsequent business affairs. The state should not be permitted to upset insurers' reasonable reliance on existing law and their contracts through the retroactive imposition of new liabilities.

[7] Michigan law permits insurers to consider uncertainty in developing rates. Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1) (1980), which implement § 2403 of the Michigan Insurance Code, Mich. Comp. Laws Ann. § 500.2403 (West 1990).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of General Motors Corporation and Ford Motor Company should be granted.

Respectfully submitted,

DONALD S. YOUNG
Counsel of Record
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560

Attorney for Michigan Association of Insurance Companies, Alliance of American Insurers, Citizens Insurance Company of America and Michigan Mutual Insurance Company

Of Counsel
KATHLEEN McCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

APPENDIX

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

Amerisure™
Insurance Company

DETROIT, MICHIGAN

(A stock insurance company)

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who Is Insured

You are insured if you are an employer named in item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy

period. It does not include the provisions of any law that provide nonoccupational disability benefits.

D. **State**

State means any state of the United States of America, and the District of Columbia.

E. **Locations**

This policy covers all of your workplaces listed in items 1 or 4 of the Information Page; and it covers all other workplaces in item 3.A. states unless you have other insurance or are self-insured for such workplaces.

PART ONE – WORKERS COMPENSATION INSURANCE

A. **How This Insurance Applies**

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. **We Will Pay**

We will pay promptly when due the benefits required of you by the workers compensation law.

C. **We Will Defend**

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;

2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;

3. litigation costs taxed against you;

4. interest on a judgment as required by law until we offer the amount due under this insurance; and

5. expenses we incur.

E. **Other Insurance**

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. **Payments You Must Make**

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. **Recovery From Others**

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. **Statutory Provisions**

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an

agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO – EMPLOYERS LIABILITY INSURANCE

A. **How This Insurance Applies**

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. **We Will Pay**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;

2. for care and loss of services; and

3. for consequential bodily injury to a spouse, child, parent, brother of sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. **Exclusions**

This insurance does not cover:

1. liability assured under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;

2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;

3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;

4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;

5. bodily injury intentionally caused or aggravated by you;

6. bodily injury occuring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;

7. damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

D. **We Will Defend**

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request; but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. **Other Insurance**

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. **Limits of Liability**

Our liability to pay for damages is limited. Our limits of liability are shown in item 3.B. of the Information Page. They apply as explained below.

1. Body Injury by Accident. The limit shown for "bodily injury by accident-each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident. A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease-policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. **Recovery From Others**

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. **Actions Against Us**

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and

2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.

PART THREE – OTHER STATES INSURANCE

A. **How This Insurance Applies**

1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
2. If you begin work in any one of those sates and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

B. **Notice**

Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

PART FOUR – YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE – PREMIUM

A. **Our Manuals**

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. **Classifications**

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. **Remuneration**

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and

2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. **Premium Payments**

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. **Final Premium**

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.

2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate

cancellation table and procedure. Final premium will not be less than the minimum premium.

F. **Records**

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. **Audit**

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX – CONDITIONS

A. **Inspection**

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. **Long Term Policy**

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. **Transfer of Your Rights and Duties**

Your rights or duties under this policy may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal rerpresentative as insured.

D. **Cancellation**

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancellation notice.
4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

E. **Sole Representative**

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancellation.

The policyholder shall participate, to the extent and upon the conditions fixed and determined by the board of directors of the Company in accordance with the provisions of law, in the distribution of any unabsorbed premiums, savings or dividends as may from time to time be so fixed and determined.

IN WITNESS WHEREOF, THE AMERISURE INSURANCE COMPANY has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the information page by a duly authorized representative of the company.

/s/ Roy A. Styles
Secretary

/s/ E. L. Cox
President

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

No. 90-1390

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, PETITIONER

v.

EVERT ROMEIN, ET AL., RESPONDENTS

FORD MOTOR COMPANY, PETITIONER

v.

ARTURO GONZALEZ, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Michigan

JOINT APPENDIX

STEPHEN M. SHAPIRO *
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

THEODORE SACHS *
Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman
1000 Farmer Road
Detroit, Michigan 48226
(313) 965-3464

THOMAS L. CASEY *
Assistant Solicitor General
State of Michigan
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

* *Counsel of Record*

PETITION FOR WRIT OF CERTIORARI FILED MARCH 5, 1991
CERTIORARI GRANTED MAY 13, 1991

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS *

	Page
Summary of Relevant Docket Entries from *Romein* v. *General Motors Corp.*	1
Summary of Relevant Docket Entries from *Gonzalez* v. *Ford Motor Co.*	2
Relevant workers' compensation forms and documents from *Romein*	3
Relevant workers' compensation forms and documents from *Gonzalez*	12
Workers' Compensation Appeal Board decision in *Gonzalez*	24
Letters submitted by the Attorney General of Michigan to the Michigan Supreme Court	29
Versions of bills leading up to enactment of 1987 PA 28, § 354	36
News Service Releases made part of record before the Michigan Supreme Court	46

* The opinions and judgments of the lower courts were printed in the petition and have not been reproduced here.

SUMMARY OF RELEVANT DOCKET ENTRIES

Romein v. General Motors Corp.

DATE	PROCEEDINGS
Workers' Compensation Appeal Board	
Dec. 22, 1977	Employer's Basic Report of Injury
Jan. 13, 1978	Notice of Commencement of Compensation Payments
Sep. 24, 1979	Plaintiff's Petition for Hearing
Dec. 18, 1980	Decision of Administrative Law Judge La-Porte
Feb. 6, 1981	Appeal Board Order
Nov. 15, 1983	Plaintiff's Petition for Hearing
June 28, 1984	Decision of Administrative Law Judge La-Porte
Jan. 9, 1985	Appeal Board Order
April 4, 1985	Appeal Board Order
April 9, 1986	Decision of Administrative Law Judge La-Porte
May 20, 1987	Decision and Order of the Appeal Board
Michigan Court of Appeals	
June 11, 1987	Application for Leave to Appeal
Sep. 10, 1987	Case consolidated on Appeal with *Gonzalez*
May 16, 1988	Opinion filed
July 7, 1988	Rehearing denied
Michigan Supreme Court	
July 28, 1988	General Motor's Application for Leave to Appeal
April 7, 1989	Order granting Leave to Appeal

DATE	PROCEEDINGS
Sept. 28, 1990	Opinion filed
Dec. 5, 1990	Motion for Rehearing denied
Dec. 27, 1990	Stay ordered

Gonzalez v. Ford Motor Co.

Workers' Compensation Appeal Board

Jan. 8, 1981	Plaintiff's Petition for Hearing
Oct. 21, 1981	Decision of Administrative Law Judge Foster
Oct. 6, 1982	Plaintiff's Petition for Hearing
Oct. 10, 1984	Decision of Administrative Law Judge Foster
May 27, 1987	Decision and Order of Appeal Board

Michigan Court of Appeals

June 23, 1987	Application for Leave to Appeal
Sep. 10, 1987	Case consolidated on Appeal with *Romein*
May 16, 1988	Opinion filed
July 7, 1988	Rehearing denied

Michigan Supreme Court

July 28, 1988	General Motor's Application for Leave to Appeal
April 7, 1989	Order granting Leave to Appeal
Sept. 28, 1990	Opinion filed
Dec. 5, 1990	Motion for Rehearing denied
Dec. 27, 1990	Stay ordered

☐ Initial 101
☐ Supplemental 101
☒ Corrected 101
Explain Rate Change

State of Michigan
DEPARTMENT OF LABOR
Bureau of Workers' Disability Compensation
LANSING, MICHIGAN

Form 101
Rev. 1-80

NOTICE OF COMMENCEMENT OF COMPENSATION PAYMENTS

INS. CO. FILE#

1. Name of employee ROMEIN, Everett SSN 362-46-5198
(Last) (First) (Middle)
2. Address 8090 Circle Dr. City Clarkston
3. Date of Personal Injury 12/5/77 4. Last day worked 12/5/77 5. Date Disability Commenced 12/6/77
6. Nature of Personal Injury Fracture Pelvis, Fracture rt. rib
7. Straight Time Earnings: Hourly rate Hours per week Total $ 370.40
Overtime Earnings: Hourly rate Hours per week Total $
If board, room furnished give value Total $
If on piece work or Commission, explain fully (Combined weekly earnings $ 370.40)

8. Number of dependents 1
9. Compensation rate $42.03 Date wages reduced by other employer-financed benefits as provided for in Section 354 of the Act.
10. Date first payment due Date first payment actually made
11. Name of Employer Pontiac Motor Division Address Pontiac, MI 48053
12. Name of Insurance Company Self-insured Address
13. Date of this report 7/19/82 Signature of designated agent of insurer or self-insured employer.

Form 101
Rev. 7-76

State of Michigan
DEPARTMENT OF LABOR
Bureau of Workers' Disability Compensation
LANSING, MICHIGAN

☒ Initial 101
☐ Supplemental 101
☐ If Corrected 101
Explain

NOTICE OF COMMENCEMENT OF COMPENSATION PAYMENTS

INS. CO. FILE#

1. Name of employee ROMEIN, Evert (Last) (First) (Middle) SSN 362 46 5198
2. Address 8216 Elizabeth Lake Rd. City Union Lake
3. Date of Personal Injury 12/5/77 4. Last day worked 12/5/77 5. Date Disability Commenced 12/6/77
6. Nature of Personal Injury Fractured pelvis, fx. (1) rib
7. Straight Time Earnings: Hourly rate $9.26 Hours per week 40 Total $ 370.40
   Overtime Earnings: Hourly rate Hours per week Total $
   If board, room furnished give value Total $
   Combined weekly earnings $ 370.40
   If on piece work or Commission, explain fully
8. Number of dependents 1
9. Compensation rate $132.00 If partial, explain
10. Date first payment due 12/23/77 Date first payment actually made 12/23/77*
11. Name of Employer Pontiac Motor Division Address Pontiac, Michigan 48053
12. Name of Insurance Company Self-insured Address
13. Date of this report 12/26/77 Signature of designated agent of insurer or self-insured employer Richard L. Daly

*First notice of lost time 12/9/77

PONTIAC

[EMBLEM]

September 28, 1983

Everett Romein
8090 W. Circle Street
Clarkston, Michigan 48016

Dear Mr. Romein:

Public Act 203 of 1981, which became effective March 31, 1982 provides in fact, that Workers' Compensation benefits shall be reduced by other employer-financed and social security benefits. In accordance with this law, your weekly Workers' Compensation benefits should have been reduced to zero ($0.00) on the effective date of the legislation.

Your specific reduction is calculated as follows:

1. Weekly Benefit Entitlement as of 03/30/82 $ 99.00
2. Unreduced weekly W/C rate 132.00
3. 50% of old age SS ($705 X 12 ÷ 52X.50) 81.34
4. Weekly after tax Pension ($53.20 + 3.77) 56.97
5. W/C Payable (#2—#3—#4) -0-

Due to our failure to timely effectuate the aforementioned reduction to your Workers' Compensation Benefits, you have been overpaid $75.03 a week for 52 weeks and 1 day, for a total of $3,913.57.

Commencing in January, 1982, you received a Workers' Compensation supplement payment of $21 per week. These payments continued through July 11, 1982, at which time they were discontinued due to the lack of sufficient funding of the Compensation Supplement Fund.

The Michigan Legislature has now provided sufficient funds which allows employers to reinstate Compensation Supplement payments. However, we will deduct the above overpayment from your future entitlement until the full amount is repaid.

I am sorry for any inconvenience this may have caused you.

If you have any further questions, please feel free to contact me at 857-0654.

Very truly yours,

/s/ Minnie A. Ellsworth
MINNIE A. ELLSWORTH
Workers' Compensation
Supervisor

MAE/pw

cc: file

Rev. 1-83

STATE OF MICHIGAN
DEPARTMENT OF LABOR
BUREAU OF WORKERS' DISABILITY COMPENSATION

INS. CO.
CLAIM #

NOTICE OF COMMENCEMENT OF COMPENSATION PAYMENTS

PART A.

EMPLOYEE ROMEIN, (LAST) Evert (FIRST) (MIDDLE) SOC. SEC. # 362-46-5198

ADDRESS 8090 W. Circle Dr. (STREET OR POST OFFICE BOX) DATE OF INJURY 12 (MONTH) 05 (DAY) 77 (YEAR)

Clarkston (CITY) MI (STATE) 48016 (ZIP CODE) DATE OF BIRTH 06 (MONTH) 02 (DAY) 12 (YEAR)

EMPLOYER Pontiac Motor Division of General Motors Corp. Federal ID # 380572515 066

ADDRESS One Pontiac Plaza, (STREET OR POST OFFICE BOX) Pontiac, (CITY) MI (STATE) 48053 (ZIP CODE)

INSURANCE CARRIER OR SERVICE CO. Self-insured NAIC OR SELF-INSURANCE # 37999000 A23

PART B.

1. Indicate reason for filing: a. ☐ Initial filing c. ☐ Reopened claim e. ☐ Appeal pending - 70% payments
   b. ☐ Initial filing per order d. ☒ Correction or status change f. ☐ Discontinued payments resumed per Sec. 354
2. If correction or status change, indicate the reason(s) for change.
   a. ☐ Age-65 reduction d. ☐ Benefit type f. ☐ Unemployment offset h. ☐ Advance payment j. ☐ Part A error
   b. ☐ Dependency e. ☒ Benefit coordination g. ☐ Reimbursement by fund i. ☐ Payments discontinued per Sec. 354
   c. ☐ Other
3. Benefit type: a. ☐ Death b. ☐ Permanent and Total c. ☐ Specific loss d. ☐ Partial e. ☐ Temporary Total f. ☐ Other
4. If specific loss involves an amputation, attach a diagram designating exact point of amputation signed by attending physician.
5. Last day worked 12 (Month) 05 (Day) 77 (Year) 6. Date disability commenced 12 (Month) 06 (Day) 77 (Year)
7. Nature of injury Fracture Pelvis, Fracture right rib
8. Average weekly wage: $370.40 9. Length of workweek: 6 days
10. Employee's filing status on the date of injury: a. ☐ Single b. ☐ Single head of household c. ☒ Married filing joint d. ☐ Married filing separate
11. Number of dependents: 01 12. Benefit standard: a. ☐ 2/3 average weekly wage b. ☐ 80% after-tax average weekly wage
13. Weekly compensation base rate $ 29.59 (To determine base rate, use # 8, 10, 11 above.)
14. Adjustments to weekly compensation base rate

	Amount		Amount		Amount
a. ☐ Age-65 reduction (—)		d. ☐ Unemployment offset*(—)		f. ☐ Advance payment	(—)
b. ☑ Soc. Sec. Coord.*(—)	8.41	e. ☐ Other benefit coord.* (—)		g. ☐ Double compensation	(+)
c. ☐ Other ( )				h. ☐ Compensation supplement	(+) $21.00

*Part C must be completed (+) (—) Amount to be added or deducted from weekly base rate

15. Adjusted weekly compensation rate: $ 21.00 (To determine adjusted rate, use #13 and 14 above.)
16. Amount of line 15 to be paid by carrier and not reimbursed 0 17. Effective date of rate on line 16 04 (Month) 01 (Day) 83 (Year)
18. If the amount on line 15 does not equal the amount on line 16, indicate the reason(s):
   a. ☐ Compensation Supplement Fund Reimbursement c. ☐ Second Injury Fund Reimbursement e. ☐ Payments Discontinued 50% per Sec. 354 g. ☐ 70% Appeal Payment
   b. ☐ Silicosis and Dust Disease Fund Reimbursement d. ☐ Self-Insurers' Security Fund Reimbursement f. ☐ Payments Discontinued 100% per Sec. 354 h. ☐ Other
19. Date carrier received notice of injury: (Month) (Day) (Year) 20. Date first payment made (Month) (Day) (Year)
21. Date of report: 10 (Month) 19 (Day) 83 (Year)

A COPY OF THIS FORM HAS BEEN SENT TO THE EMPLOYEE

Minnie A. Ellsworth (313) 857-0654
Claims person to whom correspondence should be sent Telephone #

One Pontiac Plaza, Pontiac, MI 48053
Claims office address

Minnie A. Ellsworth
Authorized signature

RECEIVED
LABOR DIVISION
OCT 25
MICH.

IF ANY OF THE ABOVE INFORMATION IS INCORRECT, PLEASE CONTACT THE INSURANCE CARRIER OR THE BUREAU OF WORKERS' DISABILITY COMPENSATION.

12/5/77

The Michigan Workers' Disability Co. ensation Act provides that employers may reduc air obligation to pay or cause to be paid weekly worker's compensation benefits by coordinating the amounts of other benefits received by the employee for the same time period. The types of other benefits subject to coordination are: social security old-age insurance benefits; benefits under a self-insurance plan, wage continuation plan, disability insurance policy, pension or retirement plan; and unemployment compensation benefits. IT IS IMPORTANT THAT YOU NOTIFY YOUR EMPLOYER OR INSURANCE CARRIER IF THERE IS A CHANGE IN THE BENEFITS YOU RECEIVE UNDER ANY OF THESE PLANS.

PART C. TO BE COMPLETED BY CARRIER - If compensation benefits are being reduced in accordance with Section 354 or 358, please complete the appropriate section below. (Note: Figures should not be rounded to the nearest dollar.)

Section I. Other Benefits

This section must be completed if the employee has received or is receiving benefits under a self-insurance plan, wage continuation plan, disability insurance plan, or pension or retirement plan.

Complete lines a - e on the table below for each applicable benefit plan according to the following instructions.

Line

a. Weekly Benefit Amount - This is the weekly amount of benefits paid to the employee. If benefits are paid monthly, divide the monthly amount by 4.33 and enter on Line (a).

b. 80% After-Tax Amount - To find the 80% after-tax amount, take the amount from Line (a) and find its corresponding after-tax amount based on the employee's filing status and number of dependents using the 80% after-tax tables provided by the bureau.

c. 100% After-Tax Amount - To find the 100% after-tax amount, take the amount from Line (b) and multiply by 1.25.

d. FICA Tax - When a FICA deduction is not taken for a benefit plan, determine the FICA Tax amount by multiplying Line (a) by the FICA tax rate in effect on the July 1 of the year preceding the date of injury. Note: Cases with a 1982 injury date shall use .0665 as the FICA tax rate and cases with a 1983 injury date shall use .067.

e. Percent Employer Contribution - To determine the percent of employer contribution for any self-insurance plan, wage continuation plan or disability insurance plan, divide the premium amount paid by the employer by the total insurance premium. Round to the nearest percent and enter on Line (e). To determine the percent of employer contribution to any pension or retirement plan, divide the employer's total contribution to the plan by the total amount contributed to the plan. Round to the nearest percent and enter on Line (e).

f. Income to be Coordinated - To determine the amount of income to be coordinated, add the amounts from Line (c) and (d) and multiply the sum by Line (e).

	Pension	Wage Continuation	Disability Insurance		Self-Insurance	Other
			First 6 Mos	Over 6 Mos		
1 a Weekly benefit amount	$132.00					
b 80% after-tax amount of (a)	$ 42.56					
	X 1.25	X 1.25	X 1.25	X 1.25	X 1.25	X 1.25
c 100% after-tax amount	$ 53.20					
d FICA tax*	$ 3.77					
e % Employer contribution	100%					
f Income to be coordinated**	$ 56.97					

*Does not apply in all cases. See directions above **Line f = (Lines c + d) x Line e

2. TOTAL AMOUNT OF WEEKLY OTHER BENEFITS TO BE COORDINATED $56.97 (Total of all amounts in line f.)
This figure should appear under #14e on the front of this form.

Section II. Social Security

This section pertains to old-age insurance benefits received by the employee under the Social Security Act. NOTE: Only the employee's monthly gross old-age benefit (before deduction for medicare) may be coordinated.

1. Monthly old-age benefit _____
2. Weekly old-age benefit (above amount ÷ 4.33) _____
3. TOTAL AMOUNT OF SOCIAL SECURITY BENEFITS TO BE COORDINATED (50% of Line 2) _____
This figure should appear under 14b on the front of this form.

Section III. Unemployment Compensation

1. Number of weeks awarded _____
2. Beginning date of unemployment compensation _____ Scheduled expiration date _____
3. TOTAL WEEKLY UNEMPLOYMENT COMPENSATION BENEFITS _____
This figure should appear under 14d on the front of this form.

OLF

Section IV. Remarks

II-5

STATE OF MICHIGAN

[SEAL]

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF LABOR

C. PATRICK BABCOCK, Director

Bureau of Workers' Disability Compensation
309 N. Washington
P.O. Box 30016
Lansing, Michigan 48909

NOTICE OF DISPUTE
FILED BY INSURANCE CO. OR
SELF INSURED EMPLOYER

Soc. Sec. No. 362-46-5198

1. Name of Injured Employee Romein Evert
   Last First M.I.
2. Address of Injured Employee 8090 W. Circle Street, Clarkston, MI 48016
3. Name of Employer CPC Pontiac Operations of GM Corporation
4. Name of Insurance Company (Not Agent) self-insured
5. Date of Injury 12/05/77
6. Place Alleges Pontiac Motor Div.
7. Reason for Dispute (by Insurance Co. or Self Insured Employer) Workers Disability Compensation weekly benefit payments, paid on and after March 31, 1982, are being reduced as provided in

Section 418.354. It is specifically intended that this dispute is a continuing dispute applicable to each and every reduction in workers disability compensation weekly benefit payments made including the recoupment of any overpayment because of the receipt of other benefits as provided for in Section 418.354 for the same week and for the same number of weeks during which both workers disability compensation and the other benefit payments were made and would have been made in the future except for the provisions of Section 418.354.

The insurance company or self insured employer reserve the right to dispute the claim for other reasons should an application for Hearing and Adjustment of Claim be filed.

8. Do you believe the dispute can be resolved by conference without a formal hearing?

Yes or No

Signed by /s/ Minnie A. Ellsworth
(Name-title)

CPC-Pontiac
(Name of insurance company or self-insured employer)

Date March 14, 1986

Claim or file number

One Pontiac Plaza

Pontiac, Michigan

48058-3484
Address

Telephone

NOTE: This form is submitted by the insurance carrier or self-insured employer to the Bureau of Workers' Disability Compensation.

Forward in duplicate to the Bureau on or before the 14th day after employer has notice or knowledge of the alleged injury or death in all cases where the right of the injured or dependent to compensation is disputed. Mail one copy of form 107 to the injured employee.

STATE OF MICHIGAN

BUREAU OF WORKERS' DISABILITY COMPENSATION

VOLUNTARY PAYMENT FORM

In the case of ARTURO GONZALES vs FORD MOTOR COMPANY the plaintiff and defendant agree that an order may be entered dismissing the plaintiff's petition for hearing. The defendants agree to pay benefits on a voluntary basis in accordance with the following:

(A) Weekly benefit rate $176.00 for the period beginning 1/1/81 to present and continuing

(B) Medical expenses to be paid Yes —— No ✓
If yes, to whom ————————

(C) Reimbursement to group carrier Yes ——
No ✓ If yes, to whom ————————

(D) Additional agreements No Interest. The Silicosis and Dust Disease Fund has agreed to reimburse Defendant, Ford Motor Co., pursuant to the statute, for all weekly benefits paid in excess of $12,500

NEITHER THE PAYMENT OF COMPENSATION OR THE ACCEPTING OF THE SAME BY THE EMPLOYEE OR HIS DEPENDENTS SHALL BE CONSIDERED AS A DETERMINATION OF THE RIGHTS OF THE PARTIES UNDER THIS ACT.

ALL BENEFITS BECOME DUE AND PAYABLE ON THE DATE OF THIS AGREEMENT.

SIGNED BY /s/ James M. O'Reilly
Plaintiff Attorney

DATE COMPLETED 9/24/81

/s/ Alan S. Gorosh
Defendant
FORD MOTOR COMPANY

/s/ Andrew W. Foster
Administrative Law Judge

LANSING, MICHIGAN 48909

DECISION

Arturo Gonzalez Employee	Ford Motor Company Employer-Insurer(s)
365-36-5761 Soc. Security #	vs.

A hearing having been held September 29, 1981 at Detroit, Michigan on petition of (plaintiff) (defendant), I find as follows:

That the above named employee (did) (did not) receive a personal injury arising out of and in the course of (his) (her) employment by the above named employer on 12-23-80.

IT IS FURTHER ORDERED that pursuant to the voluntary pay agreement executed by the parties on September 24, 1981, plaintiff's petition for hearing is hereby dismissed.

/s/ Andrew W. Foster
ANDREW W. FOSTER
Administrative Law Judge

Signed this 29th day of September A.D. 1981.

This award (is) (is not) stipulated by the parties.

Further compensation (will) (will not) be paid voluntarily.

UNLESS A CLAIM FOR REVIEW IS FILED BY EITHER PARTY WITHIN FIFTEEN DAYS FROM THE DATE STAMPED HEREON AS *"MAILING DATE"*, THIS DECISION SHALL STAND AS THE FINAL DECISION OF THE BUREAU OF WORKERS' DISABILITY COMPENSATION.

State of Michigan
DEPARTMENT OF LABOR
Bureau of Workers' Disability Compensation
LANSING, MICHIGAN

☒ Initial 101 ☐ Supplemental 101 ☐ If Corrected 101
Explain

NOTICE OF COMMENCEMENT OF COMPENSATION PAYMENTS

INS. CO. FILE# [illegible]

1. Name of employee GONZALEZ Arturo (Last) (First) (Middle) SSN 365-36-5761
2. Address 1741 Combes City San Benito, Texas 7858
3. Date of Personal Injury 12-23-80 4. Last day worked 12-31-80 5. Date Disability Commenced 1-1-81
6. Nature of Personal Injury Lung Condition
7. Straight Time Earnings: Hourly rate 9.545 Hours per week 40 Total $ 381.80
COLA Earnings: Hourly rate 1.15 Hours per week 40 Total $ 46.00
If board, room furnished give value Total $
Combined weekly earnings $ 427.80

If on piece work or Commission, explain fully

8. Number of dependents 1
9. Compensation rate $176.00 If partial, explain PER VOLUNTARY PAY AGREEMENT DATED 9-24-81
10. Date first payment due Ford Motor Co. 38-0549190 Date first payment actually made
11. Name of Employer Mich. Casting Center #1217 Address 22000 Gibraltar, Flat Rock, Mi. 48134
12. Name of Insurance Company Self-Insured Address
13. Date of this report 10-8-81 Signature of designated agent of insurer or insured employer.
R. A. DeShetler, Workers' Compensation Mgr.

Form 101
Rev. 1-80

65

Form 101
R

State of Michigan
DEPARTMENT OF LABOR
Bureau of Workers' Disability Compensation
LANSING, MICHIGAN

☐ Initial 101
☒ Supplemental 101
☐ Corrected 101
Explain Coord. w/ Co. Pension Benefit

NOTICE OF COMMENCEMENT OF COMPENSATION PAYMENTS

ON HS GONZALEZ

1. Name of employee Gonzales (Last) ARTURO (First) (Middle) INS. CO. FILE# 80-0094
2. Address 1714 COMBS SSN 365-36-[illegible]576
3. Date of Personal Injury 12-23-80 Last day worked City SAN Benito, Tex 785
6. Nature of Personal Injury 5. Date Disability Commenced 1-1-81
7. Straight Time Earnings: Hourly rate Hours per week Total $
   Overtime Earnings: Hourly rate Hours per week Total $
   If board, room furnished give value Total $
   Combined weekly earnings $ 127.80
   If on piece work or Commission, explain fully
8. Number of dependents 0
9. Compensation rate 0 If partial, explain See 101 B
10. Date first payment due Ford Motor Co - 38-0549190 Date first payment actually made
11. Name of Employer MCC Fizir Address 3001 Miller Rd, Dearborn, M. 48121
12. Name of Insurance Company OWN RISK Address SAME
13. Date of this report 7-28-82 Signature of designated agent of insurer or self-insured employer RA Desketter

Base rate coordinated with Company Pension benefit Plan Effective 4-1-82

16

Form 101-b

DEPARTMENT OF LABOR
BUREAU OF WORKERS' DISABILITY COMPENSATION

☒ Initial
☐ Corrected

COORDINATION OF BENEFITS WORKSHEET 12-23-80

Soc. Sec. # 365-36-5761 Ins. Co. File # 80-0094

Employee Name Gonzales, Arturo Z
Last First Middle Initial

Birthdate: Mo. 07 Day 06 Yr. 22

Address 1741 Combs, San Benito, Texas 78586

Filing Status: ☒ Single ☐ Married

Employer Ford Motor Co. - Michigan Casting Ctr.

No. of Dependents 0

-see instructions on back-

Section A. Workers' Compensation Benefits

1. Contined weekly earnings from Line 7 of Form 101 $ 427.80
2. Enter the workers' compensation weekly benefit rate on Line 1. 1. 171.00

Section B. Private Benefits

1. If the employee has received or is receiving benefits under a self-insurance plan, wage continuation plan, disability insurance plan, or pension or retirement plan, please complete this section. If a benefit plan does not fall into one of these categories, use the "other" category and explain on the back of this sheet under remarks.

	Pension	Wage Continuation	Disability Insurance First 6 Mos.	Disability Insurance Over 6 Mos.	Self-Insurance	Other
a. Weekly benefit amount	208.85					
b. 80% after-tax amount of (a)	128.55					
	x 1.25	x 1.25	x 1.25	x 1.25	x 1.25	x 1.25
c. 100% after-tax amount	160.69					
d. FICA tax*	13.89	N/A	N/A			
e. % Employer contribution	—					
f. Income to be coordinated**	174.58					

*Does not apply in all cases. See directions on back. **Line f = (Lines c + d) x Line e

2. Find the total sum of all amounts in Line f and enter on Line 2. This is the total amount of private benefits to be coordinated. If none, enter "0" (zero). 2. 174.58

Section C. Social Security Old-Age Insurance Benefits

1. Monthly old-age benefit _____
2. Weekly old-age benefit rate (above amount x 12 ÷ 52) _____
3. Enter 50% of the weekly old-age benefit rate on Line 3. This is the amount of old-age insurance benefits to be coordinated. If none, enter "0" (zero). —

RECEIVED
DEPT. OF LABOR
DIVISION, INDUS.
JUL 29 '82

Section D. Unemployment Compensation Benefits

1. Number of weeks awarded _____
2. Beginning date _____
3. Scheduled Expiration Date _____
4. Enter the total amount of weekly unemployment compensation benefits on Line 4. This is the amount of unemployment compensation benefits to be coordinated. If none, enter "0" (zero). 4. _____

Section E. Coordination of Benefits

1. Total the amounts from Lines 2, 3, and 4. Enter this amount on Line 5. This is the total amount of benefits to be coordinated. 5. 174.58
2. If Line 1 is greater than Line 5, enter the difference on Line 6. THIS IS THE TOTAL AMOUNT OF COORDINATED WORKERS' COMPENSATION BENEFITS TO BE PAID WEEKLY.

   If Line 1 is less than or equal to Line 5, enter "0" (zero) on Line 6. There are no workers' compensation benefits due after coordination.
3. Enter the amount from Line 6 to Form 101, Line 9. 6. 0

A COPY OF THIS FORM HAS BEEN MAILED TO THE EMPLOYEE

R A DeShetler
Signature of authorized representative (in ink)

7-28-82
Report date

R A DeShetler
Name of person to whom correspondence should be sent

Ford Motor Co.
Name of carrier or self-insured employer Room 1950

PO Box 1600 3001 Miller Rd Dbn, 48121
Address

WC. Adm 323-5845
Title Telephone #

70

17

STATE OF MICHIGAN

[SEAL]

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF LABOR

C. PATRICK BABCOCK, Director

Bureau of Workers' Disability Compensation
309 N. Washington
P.O. Box 30016
Lansing, Michigan 48909

NOTICE OF DISPUTE FILED BY INSURANCE CO. OR SELF INSURED EMPLOYER

Soc. Sec. No. 365-36-5761

1. Name of Injured Employee Gonzales, Arturo
2. Address of Injured Employee 1741 Combs, San Benito, Tex 78586
3. Name of Employer Ford Motor Co—Michigan Casting Cntr 38-0549190
4. Name of Insurance Company (Not Agent) Own Risk 374F1217
5. Date of Injury 12-23-80
6. Place Work
7. Reason for Dispute (by Insurance Co. or Self Insured Employer) Workers' Disability Compensation weekly benefits payments, paid after March

31, 1982, are being reduced as provided in Section 418.354, effective March 31, 1982. It is specifically intended that this dispute is a continuing dispute applicable to each and every reduction in workers' disability compensation weekly benefit payments made including the recoupment of any overpayment because of the receipt of non-coordinated weekly benefits for the same week and for the same number of weeks during which both workers' disability compensation and the non-coordinated weekly benefit payments were made and would have been made in the future except for the provisions of Section 418.354.

The insurance company or self insured employer reserve the right to dispute the claim for other reasons should an application for Hearing and Adjustment of Claim be filed.

8. Do you believe the dispute can be resolved by conference without a formal hearing? NO

Yes or No

Signed by /s/ RA DeShetler, W-C Adm
(Name-title)

Ford Motor Co
(Name of insurance company or self-insured employer)

R.1050
P.O. Box 1600
3001 Miller Rd.
Dearborn, Mi 48121
Address

Date 7-28-82

Claim or file number 80-094

Telephone 323-5845

NOTE: This form is submitted by the insurance carrier or self-insured employer to the Bureau of Workers' Disability Compensation.

Forward in duplicate to the Bureau on or before the 14th day after employer has notice or knowledge of the alleged injury or death in all cases where the right of the injured or dependent to compensation is disputed. Mail one copy of form 107 to the injured employee.

STATE OF MICHIGAN

BUREAU OF WORKERS' COMPENSATION

HONORABLE ANDREW FOSTER
Administrative Law Judge

ARTURO GONZALES, PLAINTIFF

-vs-

FORD MOTOR COMPANY, DEFENDANTS

STIPULATED STATEMENT OF FACTS

Petitioner, ARTURO GONZALES, was employed by the Ford Motor Company from June 9, 1953, until December 31, 1980. Upon retirement from Defendant Company he filed a Workers' Compensation Claim, alleging, among other things, that he developed a disabling lung condition as a consequence of his foundry exposure for the previous twenty years.

Physical examinations performed during the pendency of his claim proved conclusively that he suffered from silicosis in both lungs. Submission of these medical reports to the Silicosis and Dust Disease Fund resulted in an agreement that they would reimburse Defendant Company for all weekly benefits paid in excess of Twelve Thousand Five Hundred ($12,500.00) Dollars.

A Voluntary Payment Form was submitted to the Bureau on September 24, 1981, signed by the counsel for both parties, stating that weekly benefits of

$176.00 were to be paid to Petitioner from January 1, 1981, on a continuing basis and further stating that the Silicosis and Dust Disease Fund had agreed to reimburse Ford Motor Company for all weekly benefits paid in excess of $12,500.00, pursuant to the statute.

In a letter dated August 9, 1982, Petitioner was informed that, effective March 31, 1982, weekly benefits were being reduced as provided by Section 418.354 of the Act. This reduced his weekly benefit rate from $176. to $0.00.

OPN. #108

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

ARTURO GONZALEZ, SS #365-36-5761, PLAINTIFF

vs.

FORD MOTOR COMPANY, DEFENDANT

Appeal from Administrative Law Judge Foster

JAMES M. O'REILLY FOR THE PLAINTIFF, MARTIN L. CRITCHELL & ALAN S. GOROSH FOR THE DEFENDANT.

OPINION ON REVIEW

GOOLSBY, MEMBER OF THE APPEAL BOARD

Defendant appeals from the decision, mailed October 10, 1984, of Administrative Law Judge Andrew Foster that "defendant improperly coordinated and reduced benefits due and owing plaintiff."

The administrative law judge further found that "MCLA 418.354 does not apply retrospectively to plaintiff's claim since plaintiff's claim since plaintiff's injuries of January 1, 1981 were prior to the effective date of the Act." The administrative law judge also assessed a $1,500 penalty against defendant for its failure to pay full weekly benefits for all violations which occurred prior to filing Notice of Dispute, July 29, 1982. We reverse.

At the time this dispute arose, plaintiff was being paid weekly compensation at the rate of $176.00 pursuant to a voluntary agreement of the parties, dated September 24, 1981.

The dispute was submitted to the administrative law judge on a stipulated set of facts:

> "Petitioner, ARTURO GONZALES, was employed by the Ford Motor Company from June 9, 1953, until December 31, 1980. Upon retirement from Defendant Company he filed a Workers' Compensation Claim, alleging, among other things, that he developed a disabling lung condition as a consequence of his foundry exposure for the previous twenty years.
>
> Physical examinations performed during the pendency of his claim proved conclusively that he suffered from silicosis in both lungs. Submission of these medical reports to the Silicosis and Dust Disease Fund resulted in an agreement that they would reimburse Defendant Company for all weekly benefits paid in excess of Twelve Thousand Five Hundred ($12,500.00) Dollars.
>
> A Voluntary Payment Form was submitted to the Bureau on September 24, 1981, signed by the counsel for both parties, stating that weekly benefits of $176.00 were to be paid to Petitioner from January 1, 1981, on a continuing basis and further stating that the Silicosis and Dust Disease Fund had agreed to reimburse Ford Motor Company for all weekly benefits paid in excess of $12,500.00, pursuant to the statute.
>
> In a letter dated August 9, 1982, Petitioner was informed that, effective March 31, 1982, weekly benefits were being reduced as provided by Sec-

tion 418.354 of the Act. This reduced his weekly benefit rate from $176. to $0."

Both counsel apparently submitted briefs on the matter to the administrative law judge although the file only contains that of plaintiff.

In *Chambers* v *General Motors Corp*, 422 Mich 636 (1985), the Supreme Court determined that MCL 418.354 is procedural, and applies retroactively, regardless of the date of injury. Thus, the holding in *Chambers* negates the basis of the decision of the administrative law judge in this case.

Pursuant to the *Chambers* holding, defendant was within its right to coordinate plaintiff's pension benefit effective March 31, 1982, the date that Section 354 became effective. The fact that defendant was entitled to reimbursement from the Silicosis and Dust Disease Fund for all weekly benefits paid in excess of $12,500, did not affect defendant's right to apply the provisions of Section 354.

We further find that the assessment of a penalty in this case was improper. Pursuant to Section 801 (2), penalties are assessable only when compensation is due and payable and there is no ongoing dispute between the parties. The *Chambers* court rejected the requirement that an employer must file a petition before coordinating benefits under Section 354:

> "Section 354 contains no provision requiring the employer to file a petition and present proofs at an evidentiary hearing prior to coordinating an employee's benefits. The express language of subsection (10) makes it clear that what is required of the employer is that it report the credit or reduction in benefits and provide proof of the basis for it if requested by the bureau." At 661.

The file contains such a report, Form 101-b.

The *Chambers* court determined that such a procedure does not deny due process, because if insufficient evidence is presented or the director is not satisfied that the Act is not being complied with, he or she may convene a Rule 5 hearing. If the claimant is not satisfied with the director's actions, he or she may file for a hearing pursuant to MCL 418.847; MSA 17.237(847); AC, R 408.34. *Chambers, supra*, at 661-662.

Although we have concluded that the administrative law judge was wrong in his decision, we note that the Legislature has recently enacted 1987 PA 28, with immediate effect, which unequivocally reverses the ruling, in *Chambers, supra*. The following language has been added to Section 354:

> "(17) The decision of the Michigan Supreme Court in *Franks* v *White Pine Copper Division*, 422 Mich 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361 or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

Accordingly, the administrative law judge is reversed, but defendant must now comply with the dictates of 1987 PA 28.

Because of this recent amendment, we see no reason to address defendant's reimbursement issue, as it is now moot.

Member Smith concurs.

Dated and entered at Lansing, Michigan, this 27th day of May, A.D. 1987;

WORKERS' COMPENSATION APPEAL BOARD

GARRY GOOLSBY

SHARON L. SMITH Members

Letter to the Editor of The Detroit Free Press, P. 8A, Oct. 19, 1985

Workers' comp ruling
benefits only employers

THIS IS regarding your editorial of Oct. 14, concerning the recent state Supreme Court decision commonly referred to as Chambers vs. General Motors Corp. *(Editor's note: The Supreme Court in that case ruled that co-ordination of workers' comp with other benefits did apply to work-related injuries or illnesses incurred before 1982, the year the Legislature reformed the workers' comp law.)*

I can understand the eagerness with which many, including yourselves, have embraced this decision as a positive step toward reform of Michigan's workers' disability compensation system. I must, however, raise a voice in dissent. Simply putting dollars back in the pockets of employers is not meaningful reform in any real sense.

As director of the Bureau of Workers' Disability at the time, I was personally involved in the long and often intense negotiations on these and other reform measures. I can assure you it was never the intent of the Milliken administration or, for that matter, the Legislature to have the co-ordination-of-benefits provisions apply to those with an injury date prior to the effective date of the amendments.

Co-ordination of benefits was primarily intended to address the retiree issue and balance or reduce future costs that would result from the increased maximum benefit level. Administration officials, including myself, along with representatives of the insurance industry and employers, many of whom are extremely

knowledgeable and competent attorneys, on numerous occasions assured the legislative committees that the Supreme Court could never do what it did in the Chambers case.

One of the primary goals of those negotiating reform was to find a way to increase, not decrease, benefits to those who were receiving inadequate benefits based on old injury dates. The compensation supplement fund was created to provide additional benefits for most, if not all, of the very people who now will see their benefits reduced as a result of the court's decision. It is interesting to note the compensation supplement was to be paid from state general funds because it was felt unfair, if not a deprivation of due process rights, to assess employers retroactively.

In this unfortunate but unanimous opinion, the court in essence gave the Legislature what can be argued is complete freedom to adjust benefit levels at its discretion. This poses tremendous implications for the insurance industry and may threaten the historical role of the employer in the program itself. One of the substantive aspects of workers' compensation has always been the certainty of benefits and the ability to forecast costs for insurance purposes. This may no longer be true if this decision is an indication of what the Legislature can do in the future.

Other provisions of the compensation law may very well mitigate the detrimental impact of Chambers on individuals, but the bottom line is that employers will reap the windfall benefit from this decision.

It now behooves this administration and the Legislature to examine the social implications and the detrimental impact on the unintended vicitms of a legislative oversight, and, to the extent possible, rec-

tify what I feel is a shameful injustice. That these individuals receive adequate compensation to maintain a decent standard of living is not, to use your words, an abuse or misuse of the workers' compensation system.

JAMES M. BRAKORA
East Lansing

WILLIAM G. MILLIKEN

October 25, 1985

Mr. Theodore Sachs, Esq.
Sachs, Nunn, Kates, Kadushin,
O'Hare, Helveston & Waldman
1000 Farmer Street
Detroit, MI 48226

Dear Mr. Sachs:

You have asked me to confirm that it was not my intent in sponsoring the 1980 and 1981 workers' compensation legislation for coordination of benefits to have such coordination apply to persons previously injured. You have brought to my attention the recent decision of the Michigan Supreme Court in *Chambers* v *General Motors Corporation*, where the Court holds to the contrary and in part cites remarks by me to the Ann Arbor Chamber of Commerce on November 18, 1981, in which I favored legislative action to coordinate benefits. You have also forwarded to me the recent letter by James M. Brakora to the Detroit Free Press published October 19, 1985, in which Mr. Brakora states that the Court has misconstrued the intent of my administration and of the legislature to have the coordination of benefits provisions apply only to those with injuries subsequent to the effective date of the amendments.

I am pleased to confirm that the intent of the legislation was, contrary to the Court's opinion, as Mr. Brakora has stated it.

It was our purpose, as my remarks quoted in the opinion indicated, to apply the concept of coordination of benefits but only to those persons who would under the new legislation be receiving improved benefit rates

against which any set-offs of other benefits might occur. It was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments.

You are authorized to attach this letter to and to cite it in your proposed Motion for Rehearing in the *Chambers* case.

Very truly yours,

/s/ William G. Milliken
WILLIAM G. MILLIKEN

THEODORE J. ST. ANTOINE
UNIVERSITY OF MICHIGAN LAW SCHOOL
Ann Arbor, Michigan 48109-1215
(313) 764-9348

October 24, 1985

Theodore Sachs, Esq.
Sachs, Nunn, Kates, Kaduskin,
O'Hare, Helveston & Waldman
1000 Farmer
Detroit, MI 48226

Re: Chambers v. General Motors Corp.

Dear Mr. Sachs:

I have read the October 7, 1985 Opinion of the Michigan Supreme Court in the above-entitled case, with special attention to part II-B-3, headed, "The Public Policy Underlying the Coordination of Benefits Provisions." There the Court, on pages 12-13 of its Slip Opinion, quotes from my Report as the Governor's Special Counselor on Workers' Compensation, dated December 12, 1984, entitled *Workers' Compensation in Michigan: Costs, Benefits and Fairness.* The Court aptly characterizes me as endorsing the concept of coordination of benefits, and I of course have no objection to being quoted to that effect.

Unfortunately, in the opening sentence of this portion of its Opinion, the Court declares: "Analysis of the legislative history of the coordination of benefits provisions provides further support for our conclusion [that sections 354 and 358 of the Workers' Compensation Act authorize coordination as to workers whose injuries occurred prior to the effective dates of the amendments]." This could result in the totally

misleading inference that my Report had something to say, one way or another, on this particular issue.

I never intended to address, and do not believe I even inadvertently addressed, the issue of the injury periods to which sections 354 and 358 would be applicable. The matter was already in litigation when I began preparing my Report. I deliberately avoided dealing with it because I felt I should concentrate on the longer-term policy issues that would have to be addressed by the Legislature in the future.

Sincerely,

/s/ Theodore J. St. Antoine
THEODORE J. ST. ANTOINE
Professor of Law

VERSIONS OF BILL LEADING UP TO
1987 PA 28, § 354

S-3

REPRINT

SUBSTITUTE FOR
SENATE BILL NO. 67

(As Passed the Senate March 25, 1987)

A bill to amend sections 131, 151, 222, 301, 319, 345, 352, 354, 358, 371, 401, 431, 611, 815, and 831 of Act No. 317 of the Public Acts of 1969, entitled as amended "Worker's disability compensation act of 1969," sections 151, 319, 345, and 354 as amended by Act No. 103 of the Public Acts of 1985, section 222 as added by Act No. 103 of the Public Acts of 1985, section 301 as amended by Act No. 313 of the Public Acts of 1986, section 352 as amended by Act No. 46 of the Public Acts of 1984, section 358 as added by Act No. 357 of the Public Acts of 1980, sections 371 and 611 as amended by Act No. 32 of the Public Acts of 1982, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418.131, 418.151, 418.222, 418.301, 418.319, 418.345, 418.352, 418.354, 418.358, 418.371, 418.401, 418.431, 418.611, 418.815, and 418.831 of the Michigan Compiled Laws; to add sections 102, 120, 133 subsection only at the time a worker's compensation insurance policy is entered into or renewed.

(16) This section shall not apply to payments made to an employee as a result of liability pursuant to section 361(2) and (3) for the specific loss period set forth therein. It is the intent of the legislature that, because benefits under section 361(2) and (3)

are benefits which recognize human factors substantially in addition to the wage loss concept, coordination of benefits should not apply to such benefits.

(17) THIS SECTION APPLIES TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR PERSONAL INJURIES OCCURRING BEFORE, ON, OR AFTER MARCH 31, 1982. EXCEPT FOR PAYMENTS MADE PURSUANT TO AN ORDER OF A HEARING REFEREE OR THE APPEAL BOARD OR PURSUANT TO COURT ORDER, ANY PAYMENTS MADE TO AN EMPLOYEE BEFORE OCTOBER 7, 1985 RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT WERE NOT COORDINATED PURSUANT TO THIS SECTION SHALL NOT BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER AFTER MAY 15, 1987. AN EMPLOYER OR CARRIER THAT RECEIVED REIMBURSEMENT BEFORE MAY 15, 1987 SHALL NOT BE AFFECTED BY THE PROVISIONS OF THIS SUBSECTION.

(18) NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, THE REQUIREMENT OF THIS SECTION TO COORDINATE BENEFITS PAYABLE AFTER MAY 15, 1987, ARISING FROM A PERSONAL INJURY OF AN EMPLOYEE OCCURRING BEFORE MARCH 31, 1982 SHALL NOT REDUCE THE EMPLOYEE'S TOTAL INCOME AFTER THE DATE OF INJURY BELOW 100% OF THE EMPLOYEE'S AFTER TAX WEEKLY WAGE BEFORE THE DATE OF INJURY.

(19) If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder hereof.

Sec. 358. (1) Net weekly benefits payable under section 351, 361, or lump sum benefits under section 835, shall be reduced by 100% of the AFTER-TAX amount of benefits paid or payable to the injured employee under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.73 of the Michigan Compiled Laws, for identical periods of time and chargeable to the same employer.

(2) AS USED IN SUBSECTION (1), "AFTER-TAX AMOUNT" MEANS THE GROSS AMOUNT OF THE BENEFIT PAID OR PAYABLE UNDER ACT NO. 1 OF THE PUBLIC ACTS OF THE EXTRA SESSION OF 1936, REDUCED BY THE PRORATED WEEKLY AMOUNT WHICH WOULD HAVE BEEN PAID, IF ANY, UNDER THE FEDERAL INSURANCE CONTRIBUTIONS ACT, 26 U.S.C. 3101 TO 3126, STATE INCOME TAX AND FEDERAL INCOME TAX, CALCULATED ON AN ANNUAL BASIS USING AS THE NUMBER OF EXEMPTIONS THE DISABLED EMPLOYEE'S DEPENDENTS PLUS THE EMPLOYEE, AND WITHOUT EXCESS ITEMIZED DEDUCTIONS.

HOUSE SUBSTITUTE FOR SENATE BILL NO. 67

A bill to amend sections 131, 301, 354, and 401 of Act No. 317 of the Public Acts of 1969, entitled as amended "Worker's disability compensation act of 1969," section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418.131, 418.301, 418.354, and 418.401 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 131, 301, 354, and 401 of Act No. 317 of the Public Acts of 1969, section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418.131.

(14) This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section.

(15) With respect to volunteer fire fighters, volunteer safety patrol officers, volunteer civil defense workers, and volunteer ambulance drivers and attendants who are considered employees for purposes of this act pursuant to section 161(1)(a), the reduction of weekly benefits provided for disability insurance

payments under subsection (1)(b) and (c) and subsection (11) may be waived by the employer. An employer that is not a self-insurer may make the waiver provided for under this subsection only at the time a worker's compensation insurance policy is entered into or renewed.

(16) This section shall not apply to payments made to an employee as a result of liability pursuant to section 361(2) and (3) for the specific loss period set forth therein. It is the intent of the legislature that, because benefits under section 361(2) and (3) are benefits which recognize human factors substantially in addition to the wage loss concept, coordination of benefits should not apply to such benefits.

(17) THIS SECTION APPLIES ONLY TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR PERSONAL INJURIES OCCURRING ON OR AFTER MARCH 31, 1982. ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE NOT BEEN COORDINATED UNDER THIS SECTION AS OF THE EFFECTIVE DATE OF THIS SUBSECTION SHALL NOT BE COORDINATED, SHALL NOT BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS, AND SHALL NOT BE SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER.

(18) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIA-

BILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE BEEN COORDINATED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION SHALL BE CONSIDERED TO BE AN UNDERPAYMENT OF COMPENSATION BENEFITS, AND THE AMOUNTS WITHHELD PURSUANT TO COORDINATION SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, TO THE EMPLOYEE BY THE EMPLOYER OR CARRIER.

(19) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY EMPLOYEE WHO HAS PAID AN EMPLOYER OR CARRIER MONEY ALLEGED BY THE EMPLOYER OR CARRIER TO BE OWED THE EMPLOYER OR CARRIER BECAUSE THAT EMPLOYEE'S BENEFITS HAD NOT BEEN COORDINATED UNDER THIS SECTION AND WHOSE DATE OF PERSONAL INJURY WAS BEFORE MARCH 31, 1982 SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, THAT MONEY BY THE EMPLOYER OR CARRIER.

* * * *

SENATE SUBSTITUTE FOR
HOUSE SUBSTITUTE FOR
SENATE BILL NO. 67

A bill to amend sections 131, 301, 354, 401, 431, and 831 of Act No. 317 of the Public Acts of 1969, entitled as amended "Worker's disability compensation act of 1969," section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418.131, 418.301, 418.354, 418.401, 418.431, and 418.831 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 131, 301, 354, 401, 431, and 831 of Act No. 317 of the Public Acts of 1969, section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418, 131, substantially in addition to the wage loss concept, coordination of benefits should not apply to such benefits.

(17) THIS SECTION APPLIES ONLY TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR PERSONAL INJURIES OCCURRING ON OR AFTER MARCH 31, 1982. ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE NOT BEEN CO-

ORDINATED UNDER THIS SECTION AS OF THE EFFECTIVE DATE OF THIS SUBSECTION SHALL NOT BE COORDINATED, SHALL NOT BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS, AND SHALL NOT BE SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER.

(18) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE BEEN COORDINATED BEFORE MAY 15, 1987 SHALL NOT BE CONSIDERED TO BE AN UNDERPAYMENT OF COMPENSATION BENEFITS, AND THE AMOUNTS WITHHELD PURSUANT TO COORDINATION SHALL NOT BE REIMBURSED TO THE EMPLOYEE BY THE EMPLOYER OR CARRIER.

(19) If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of THIS SECTION.

Sec. 401. (1) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in WORK SUITABLE TO HIS OR HER QUALIFICATIONS AND TRAINING resulting from a personal injury.

HOUSE SUBSTITUTE FOR
SENATE SUBSTITUTE FOR
HOUSE SUBSTITUTE FOR
SENATE BILL NO. 67

A bill to amend sections 131, 301, 354, and 401 of Act No. 317 of the Public Acts of 1969, entitled as amended "Worker's disability compensation act of 1969," section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being sections 418.131, 418.301, 418.354, and 418.401 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 131, 301, 354, and 401 of Act No. 317 of the Public Acts of 1969, section 301 as amended by Act No. 313 of the Public Acts of 1986, section 354 as amended by Act No. 103 of the Public Acts of 1985, and section 401 as amended by Act No. 314 of the Public Acts of 1986, being section 418.131.

(17) THIS SECTION APPLIES ONLY TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR PERSONAL INJURIES OCCURRING ON OR AFTER MARCH 31, 1982. ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE NOT BEEN COORDINATED UNDER THIS SECTION AS OF THE EFFECTIVE DATE OF THIS SUBSECTION SHALL NOT BE COORDINATED, SHALL NOT

BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS, AND SHALL NOT BE SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER.

(18) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 385 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE BEEN COORDINATED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION SHALL BE CONSIDERED TO BE AN UNDERPAYMENT OF COMPENSATION BENEFITS, AND THE AMOUNTS WITHHELD PURSUANT TO COORDINATION SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, TO THE EMPLOYEE BY THE EMPLOYER OR CARRIER.

(19) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY EMPLOYEE WHO HAS PAID AN EMPLOYER OR CARRIER MONEY ALLEGED BY THE EMPLOYEE OR CARRIER TO BE OWED THE EMPLOYER OR CARRIER BECAUSE THAT EMPLOYEE'S BENEFITS HAD NOT BEEN COORDINATED UNDER THIS SECTION AND WHOSE DATE OF PERSONAL INJURY WAS BEFORE MARCH 31, 1982 SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, THAT MONEY BY THE EMPLOYER OR CARRIER.

Gongwer 5/8/87

GONGWER
NEWS SERVICE, INC.

MICHIGAN REPORT

REPORT NO. 88, VOLUME 14 FRIDAY MAY 8, 1987

EX-JUSTICE SAYS COMP PROVISION ILLEGAL; ENGLER WARNS OF IMPASSE

Opposition to Governor Blanchard's workers' compensation proposal was raised on two fronts Friday as a former Supreme Court justice retained by General Motors asserts a key provision of [it] is unconstitutional and the Senate Republican leader warned of a potential impasse because of the governor's refusal to negotiate. Administration officials defended the bill, which will probably be challenged on two constitutional issues, and urged the Senate to allow a vote on what Mr. Blanchard described as a "balanced, fair package."

The bill would exclude about 9,000 injured workers from a coordination of benefits requirement, more tightly prohibit workers to sue employers injuries unless they are intentionally-caused, and adopt a definition of disability making it harder for injured workers to collect benefits.

The constitutional questions raised earlier by business regarding payment of benefits plus interest to offset over two years of coordinated benefits to workers injured before a 1982 change in the compensation law were reinforced by a legal memo by Theodore Souris, a justice from 1960-68. The memo, dated May 7 and distributed Friday to the governor's staff and legislative leaders, said the provision would violate the constitutional ban against ex poste facto laws.

The provision, which would cost businesses millions of dollars, "clearly violates the rights of employers and (insurance) carriers to due process, and may constitute an impairment of contract rights as well," Mr. Souris said. The payment would create a new liability where none existed before, he said.

The provision is intended to fully reverse a 1985 Supreme Court ruling, which declared employer-paid benefits must be coordinated rather than added together for all employees, not just those injured after the 1982 change as legislative leaders at the time said was intended. No dispute exists on the legality of excluding those workers from coordination as of the date this new proposal is enacted.

Deputy Commerce Director Lou Glazer said the governor is committed to overturning the court ruling as a matter of public policy. "If there is a constitutional question, let the courts rule on it," he said. He said 90 percent of the 1985 decision would be reversed even if the retroactive portion were eventually overturned, but said the package would still be balanced because the governor and Legislature would have done as much as possible to "make those workers whole."

If the Senate does follow the House and approve the bill, business was expected to bring suit regarding the retroactive provision, while labor interests likely would challenge the constitutionality of another provision prohibiting juries to decide whether an employer intentionally injured a worker, thus permitting awards beyond the workers' comp law.

Senate Majority Leader John Engler (R-Mt. Pleasant) said the bill will not be passed as approved by an

84-19 vote by the House. He said the governor's position against further negotiations "has the potential to create a serious impasse. Reaching our mutual goal of a solution isn't helped by last-minute pressure tactics."

In a statement, Mr. Engler criticized the procedure by which the bill reached the Senate, saying, "You can't propose something on Wednesday, pass it on Thursday and expect to intimidate a chamber that has worked on this issue for six months and passed a bipartisan bill six weeks ago." That bill had been criticized as a "business wish list" but covered a wide range of issues, including a tie to a bill making the state Accident Fund a private entity.

Mr. Glazer said, however, the governor "put together a proposal that addresses the key issues that can win widespread support in the Legislature and by business. We would like to vote in the Senate on the merits of the proposal rather than worrying about who is getting credit." He predicted the bill would be passed if it is put up for a vote.

Sen William Faust (D-Westland), who had unsuccessfully tried to substitute his own proposal during Senate debate, said the Blanchard package contains the key elements to put the issue to rest. He and Sen. John Cherry (D-Clio) said they have reservations about elements sought by business, but accept the bill as a comprehenisive plan.

Gongwer 5/13/87

GONGWER
NEWS SERVICE, INC.

MICHIGAN REPORT

REPORT NO. 91, VOLUME 26

WEDNESDAY, MAY 13, 1987

WORKERS' COMP UNRESOLVED AS DEADLINE NEARS

The Legislature moved closer to a showdown on the workers' compensation bill with little progress made toward an agreement Wednesday, and the Senate-House conference committee not scheduled to meet until less than eight hours before key provisions expire at midnight Thursday. Blanchard administration officials maintained their non-negotiable position on the bill, infuriating Senate Republicans, who in turn were labelled as obstructionists by House Democrats.

Senate Majority Leader John Engler (R-Mt. Pleasant), who again insisted the sides are not far apart, again won unanimous backing of his caucus as a 20-16 partyline vote rejected the compromise reached on SB 67 by Governor Blanchard and business and labor groups. The House had reasserted its support for that version Tuesday, and leaders said the standard for any changes would have to be measured against what would win business and labor support.

"The governor has been able to gather support or non-opposition of business and labor, and we'll tell the Senate to not waste our time with some media show. If they can come up with a better plan that will have the support of business and labor, we will support

it," Speaker Gary Owen (D-Ypsilanti) said. He said Senate Republicans were being "obstructionist."

All three House conferees—Reps. Juanita Watkins (D-Detroit), Robert Evans (D-Flint) and Gordon Sparks (R-Troy)—said they support the Owen stance that the bill should be passed unless the Senate can come up with something acceptable to business and labor.

Sen. Fred Dillingham (R-Fowlerville), the conference committee chair who called the first meeting for 4:30 p.m. Thursday, said the governor's proposal is inadequate in the areas of retroactive coordination of benefits and suits for intentional injuries, leaving the entire system unsettled for years to come. Other Senate conferees are Dan DeGrow (R-Port Huron) and John Cherry (D-Mt. Morris).

Republicans indicated they now would be willing to concede the language on retroactive benefits—an item that would cost business $60-$80 million—but will insist on tighter language to prohibit injured workers from taking their cases to court rather than just the workers' compensation system.

Mr. DeGrow said he is not convinced business understands the implications of the governor's package, and cannot vote for it in its current form. "If they (business representatives) are not going to object to it, I may have to protect them from themselves," Mr. DeGrow said. "It's not the answer to keeping workers' compensation exclusive."

However, a statement earlier this week by General Motors expressed support for the basic concept of the proposal except for the retroactive benefits.

The exclusive remedy language in the Senate-passed bill was virtually air-tight, barring lawsuits unless an employer intended specifically to injure a named person, and rendering a suit void even if an employee had been injured in that fashion, but filed for workers' comp benefits.

Republicans discussed trading their even tighter exclusive remedy language for a $13 million a year program to increase benefits for some 10,000 workers whose benefits have been eroded by inflation. Earlier proposals provided for the state general fund to make those payments, something the governor has opposed.

Sen. Mitch Irwin (D-Saulte Ste. Marie), in urging the Senate approve the House substitute, said the problem was now one of personalities rather than substance. "The guts of the issue is Jim Blanchard and John Engler. Each one wants to make the other one blink. I wish they both would blink and then we could pass the bill," Mr. Irwin said.

While Mr. Engler may be looking for a way to demonstrate he will not be "bullied," a labor union spokesman said Mr. Blanchard's credibility is also on the line to hold strictly to the proposed agreement. Tim Hughes of the AFL-CIO said that the union's position to neither support nor oppose the Blanchard bill would immediately give way to ardent opposition if agreed to changes along he lines demanded by Mr. Engler.

Mr. Engler said he would not make the debate a personality battle. He said the Senate is pleased with the definitional sections but remain uncertain about the intentional tort and coordination of benefits sections. He said the chambers are very close on the remaining issues and he expected a conference committee could

work out those differences prior to the Thursday midnight expiration date.

A legal memorandum by attorneys retained by the AFL-CIO cited a 1959 Supreme Court ruling in support of the constitutionality of a provision in the agreement requiring companies to make an additional lump sum payment to up to 9,000 workers injured before 1982. The memo by Melvyn Kates and Granner Ries, circulated to legislators Wednesday, was intended to rebut a contention by the General Motors attorney who won a Supreme Court ruling that cut the benefits for those workers that the retroactive provision is an unconstitutional ex poste facto law.

Gongwer 5/14/87

GONGWER
NEWS SERVICE, INC.

MICHIGAN REPORT

REPORT NO. 92, VOLUME 26 THURSDAY, MAY 14, 1987

COMP SUNSET AVOIDED AS AGREEMENT REACHED ON BILL

Final agreement was reached late Thursday on a workers' compensation reform bill which officials hope will put the divisive issue to rest for several years to come and boost the state's business climate. With changes in two areas which Republicans said clarify Governor Blanchard's original intent. SB 67 was quickly approved, 35-1 by the Senate and 95-0 by the House.

The governor planned to sign the bill later in the evening before the midnight sunset when the current definition of disability expires. He and legislators congratulated one another for being willing to resolve their differences as they smoothed over Senate Republican Leader John Engler's objection to being presented with a "non-negotiable bill."

The bill tightens the definition under which an injured worker may claim and continue to receive benefits, reverses a court ruling which subjected some injured workers to requirements that injury benefits be set off against pension benefits, and reverses another court ruling to more strictly limit circumstances under which workers injured on the job may sue for additional damages.

"This marks a major achievement in providing our state with a strong and supportive business climate. The workers' compensation reforms that I am signing into law tonight combined with the administrative overhaul of the system enacted two years ago will complete the task of giving Michigan a cost competitive and fair workers' compensation system," Mr. Blanchard said.

The agreement signed by a House Senate conference committee was preceded by a press conference in which the governor stepped slightly back from his line against negotiating changes in the bill: "It's fair to say anything they develop that is fair and balanced and is supported by business and labor, I will support it." With negotiations still underway, Mr. Blanchard also declined to characterize Mr. Engler (R-Mt. Pleasant) as the "logjam" to approving the bill, although he said he did not understand why Republicans did not jump to congratulate him for finally accepting their positions on the issue.

Conference Committee Chair Sen. Fred Dillingham (R-Fowlerville) said the agreement was the result of "everyone's willingness to talk within the parameters the governor laid out." The agreement avoided a tremendous stalemate, he said, adding, "We did one significant thing, and that is reached agreement prior to the sunset."

The changes included: telling the Supreme Court it wrongly decided a 1985 case that cut benefits for up to 9,000 injured workers, which Republicans said would lessen the chances the court would declare unconstitutional the new requirement to retroactively pay those lost benefits; clarifying the exclusive remedy provisions for job-related injuries, permitting law-

suits for additional damages only for an intentional injury, removing language which limited suits "except as otherwise provided by law." However, the revised bill also said the language would not enlarge or reduce rights under the law.

Sen. Dan DeGrow (R-Port Huron) said the delay in adopting the bill—which was twice rejected by the Senate—was "worth it. (The initial language) opened the door to suing under other laws for various injuries." He said the change in the exclusive remedy section returns the law closer to what it was prior to the court ruling than did the original Blanchard language.

Labor Director Betty Howe said the language is only meant to clarify the governor's intent to close the window the court had opened to lawsuits outside the workers' compensation system.

Commerce Director Doug Ross agreed the revision "is perfectly consistent with what business and labor were trying to achieve. There was some feeling there was some ambiguity. Anytime you reduce ambiguity, it is helpful."

Mr. Ross said the bill will give Michigan "a fully competitive workers' compensation system that treats workers fairly." Ms. Howe, who said she accepts business arguments that the tighter definition will cut costs, said the agreement means the state can now concentrate on administratively improving the system and addressing other business issues.

Speaker Gary Owen (D-Ypsilanti) said "this is by far the most comprehensive report we've had. It's what needed to be done to the system." He said it would not make a significant impact in bringing busi-

ness to Michigan, but said there were no "winners or losers."

House Minority Leader Paul Hillegonds (R-Holland) congratulated the governor for being willing to accept some changes while Rep. Robert Emerson (D-Flint), one of the conferees, said the changes were essentially technical in nature.

The Economic Alliance for Michigan applauded the agreement which it said "reasonably would accommodate concerns of employers, employees, and the entire state for equity and competitiveness in the workers' compensation program. Best of all, the bill provides greater stability for the workers' compensation program by eliminating the annual expiration and thus confrontation over the eligibility criteria."

No. 90-1390

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, PETITIONER

v.

EVERT ROMEIN, ET AL., RESPONDENTS

FORD MOTOR COMPANY, PETITIONER

v.

ARTURO GONZALEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR PETITIONERS

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

RODERICK D. GILLUM
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In 1981, the State of Michigan enacted a statute providing that the amount of workers' compensation benefits paid after March 31, 1982, would be reduced by the amount of any other employer-financed income replacement benefits, such as pensions. In 1985, the Michigan Supreme Court ruled that this statute applied to all workers' compensation payments, whether the employees were injured before 1982 or thereafter. In 1987, however, the Michigan legislature amended the 1981 statute retroactively, eliminated the offset provision as applied to pre-1982 injuries, and required employers to reopen all such claims paid between 1982 and 1987 and to refund, with interest, any amounts that were lawfully withheld pursuant to the 1981 statute.

The questions presented are as follows:

1. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

2. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Frank J. Kelley, the Attorney General of Michigan, intervened in these cases, was an appellee in the Supreme Court of Michigan, and is a respondent in this Court. Ford Motor Company's non-wholly-owned subsidiaries are listed at Pet. App. 93a-96a. General Motors Corporation's non-wholly-owned subsidiaries are listed at Pet. App. 97a-101a.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
1. The 1981 Statute	2
2. Interpretation of the 1981 Statute	4
3. The 1987 Amendment	4
4. The *Romein* and *Gonzalez* Cases	5
5. The Court of Appeals' Decision	6
6. The Michigan Supreme Court's Decision	6
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE 1987 MICHIGAN AMENDMENT VIOLATES THE CONTRACT CLAUSE, WHICH PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT	10
A. The Terms Of State Workers' Compensation Statutes Are Read Into Every Employment Contract And Thus Create Interests Protected By The Contract Clause	10

TABLE OF CONTENTS—Continued

	Page
B. The Impairment In This Case Violates The Contract Clause	16
1. Under Existing Constitutional Standards, Michigan's Retroactive Increase In Employers' Liabilities For Workers' Compensation Benefits Violates The Contract Clause	16
a. The Substantiality Of The Contractual Impairment	17
b. The Significance And Legitimacy Of The Underlying Public Purpose	23
c. The Reasonableness Of The Means	25
2. The Court Should Restore The Original Understanding Of The Contract Clause In Accordance With Its Language, History, And Policies	28
II. THE 1987 MICHIGAN AMENDMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	37
A. Purely Retroactive Laws That Change The Legislative Policy Governing Completed Transactions Viclate Due Process	37
1. Purely Retroactive Legislation Is Presumptively Unconstitutional	38
a. Purely Retroactive Laws Are Unconstitutional When They Change Legislative Policy	38
b. Purely Retroactive Laws Burden Legitimate Expectations	42
2. The 1987 Amendment Does Not Comport With The Requirements Of Due Process	44
B. The 1987 Amendment Is Arbitrary And Irrational	48
CONCLUSION	50

TABLE OF AUTHORITIES

CASES:	Page
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	3
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978)	*passim*
Appleby v. *City of New York*, 271 U.S. 364 (1926)	11
Beer Co. v. *Massachusetts*, 97 U.S. 25 (1877)	36
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	34, 42
Brown v. *Commonwealth*, 129 Pa. Commw. 642, 566 A.2d 913 (1989)	46
Brown v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322 (Mich. App. 1984)	14
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798)	32, 33
Chambers v. *General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (Mich. 1985)	*passim*
Chicago Bd. of Realtors, Inc. v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987)	28
Cohan v. *Commissioner*, 39 F.2d 540 (2d Cir. 1930)	37
Commonwealth v. *Budd Co.*, 108 A.2d 563 (Pa. 1954)	42
Coolidge v. *Long*, 282 U.S. 582 (1931)	43, 46
Coombes v. *Getz*, 285 U.S. 434 (1932)	13, 28
Cooper v. *Wicomico County*, 398 A.2d 1237 (Md. 1979)	24
Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973)	50
Doey v. *Howland Co.*, 120 N.E. 53, cert. denied, 248 U.S. 574 (1918)	14
Douglass v. *County of Pike*, 101 U.S. 677 (1880)	13, 27
Edwards v. *Kearzey*, 96 U.S. 595 (1877)	13, 35
Energy Reserves Group v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983)	*passim*
Erickson v. *Goodell Oil Co.*, 380 Mich. 207, 180 N.W.2d 798 (1970)	14
Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983)	24
Fisk v. *Jefferson Police Jury*, 116 U.S. 131 (1885)	12, 28
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810)	33
Florida v. *Long*, 487 U.S. 223 (1988)	19

TABLE OF AUTHORITIES—Continued

	Page
Forbes Pioneer Boat Line v. *Board of Commissioners*, 258 U.S. 338 (1922)	39, 43, 45
Franks v. *White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985)	*passim*
Garvie v. *Owens-Illinois, Inc.*, 67 Mich. App. 133, 421 N.W.2d 602 (1988)	27
Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931)	40, 46
Helvering v. *Helmholz*, 296 U.S. 93 (1935)	43
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934)	11, 29, 36
Indiana ex rel. Anderson v. *Brand*, 303 U.S. 95 (1938)	11, 13, 28
In re Marriage of Fabian, 41 Cal. 3d 440, 224 Cal. Rptr. 333 (1988)	43
International Steel & Iron Co. v. *National Surety Co.*, 297 U.S. 657 (1936)	28, 35
Irving Trust Co. v. *Day*, 314 U.S. 556 (1942)	11
Kaiser Aluminum v. *Bonjorno*, 110 S. Ct. 1570 (1990)	34
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)	30
Koshkonong v. *Burton*, 104 U.S. 668 (1882)	13
Lahti v. *Fosterling*, 357 Mich. 578, 99 N.W.2d 490 (1959)	14
Lawrence v. *Anheuser-Busch, Inc.*, 523 A.2d 864 (R.I. 1987)	43
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	50
McKesson Corp. v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990)	42, 48
Michael H. v. *Gerald D.*, 491 U.S. 110 (1989)	38, 44
Minnesota Ass'n of Health Care Facilities v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985)	18
Mississippi ex rel. Robertson v. *Miller*, 276 U.S. 174 (1928)	13, 27, 28
Municipal Investors Ass'n v. *Birmingham*, 316 U.S. 153 (1942)	11

TABLE OF AUTHORITIES—Continued

	Page
Nacirema Co. v. *Johnson*, 396 U.S. 212 (1969)	14
Nichols v. *Coolidge*, 274 U.S. 531 (1927)	43, 47
Ogden v. *Saunders*, 25 U.S. (12 Wheat.) 212 (1827)	32
PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984)	24, 40, 47, 49
Pennoyer v. *McConnaughy*, 140 U.S. 1 (1891)	28
Potomac Hospital Corp. v. *Dillon*, 229 Va. 355, 329 S.E.2d 41, cert. denied, 474 U.S. 917 (1985)	46
Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935)	48, 49
Richardson v. *Belcher*, 404 U.S. 78 (1971)	4
Rochin v. *California*, 342 U.S. 165 (1952)	42
Scott v. *Alsar Co.*, 336 Mich. 532, 58 N.W.2d 910 (1953)	14
Selk v. *Detroit Plastic Products*, 345 N.W.2d 184 (Mich. 1984)	14
State ex rel. Briggs & Stratton Corp. v. *Noll*, 302 N.W.2d 487 (Wis. 1981)	46
State ex rel. Cannon v. *Moran*, 111 Wis. 2d 544, 331 N.W.2d 369 (1983)	18
State Industrial Comm'n v. *Nordenholt Corp.*, 259 U.S. 263 (1922)	13
Steamship Co. v. *Joliffe*, 69 U.S. (2 Wall.) 450 (1864)	11, 12, 28
Thomas v. *Parker Rust Proof Co.*, 279 N.W. 504 (Mich. 1938)	14
Thorp v. *Casey's General Stores*, 446 N.W.2d 457 (Iowa 1989)	46
Treigle v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936)	28
United States v. *Darusmont*, 449 U.S. 292 (1981)	40, 43
United States v. *Heinszen & Co.*, 206 U.S. 370 (1907)	39
United States v. *Locke*, 471 U.S. 84 (1985)	42
United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989)	42
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	*passim*
Untermyer v. *Anderson*, 276 U.S. 440 (1928)	22, 43, 47

TABLE OF AUTHORITIES—Continued

	Page
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	*passim*
Van Emmerik v. *Janklow*, 454 U.S. 1131 (1982)	40, 45
Veix v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940)	30
Von Hoffman v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1867)	11
Walker v. *Whitehead*, 83 U.S. (16 Wall.) 314 (1873)	13
Washington Nat'l Arena Limited Partnership v. *Treasurer*, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980)	42
W.B. Worthen Co. v. *Kavanaugh*, 295 U.S. 56 (1935)	13
W.B. Worthen Co. v. *Thomas*, 292 U.S. 426 (1934)	13, 28, 30
Welch v. *Henry*, 305 U.S. 134 (1938)	*passim*
Wood v. *Lovett*, 313 U.S. 362 (1941)	13, 23
Youngberg v. *Romeo*, 457 U.S. 307 (1982)	43
STATUTES:	
Mich. Comp. Law 418.301	18
Mich. Comp. Law 418.351	3
Mich. Comp. Law 418.352	3
Mich. Comp. Law 418.354	3
Mich. Comp. Law 418.358	3
Mich. Comp. Law 418.611	19
Mich. Comp. Law 418.833(1)	21
1980 Mich. Public Acts 357	3
1981 Mich. Public Acts 203	3
1987 Mich. Public Acts 28	5
MISCELLANEOUS:	
2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (1991)	15
THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911):	
Volume 2	32, 35
Volume 3	36

TABLE OF AUTHORITIES—Continued

	Page
C. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1961)	32
E. Corwin, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1953)	29
Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887 (1982)	33
Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379	38, 44
FEDERALIST No. 44 (Madison) (C. Rossiter ed. 1961)	9, 31, 32
FEDERALIST No. 62 (Madison) (C. Rossiter ed. 1961)	31
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960)	33, 46
Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HAST. CONST. L. Q. 525 (1987)	31, 34
A. Larson, THE LAW OF WORKMEN'S COMPENSATION	
Volume 1C (1990)	14
Volume 4 (1989)	3
McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267 (1988)	32, 35
McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12 (1967)	33, 34
Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597 (1987)	29, 34
S. Miller, LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1893)	32
Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918 (1984)	36

TABLE OF AUTHORITIES—Continued

	Page
Palmer, *Obligations of Contracts: Intent and Distortion*, 37 CASE W. RES. L. REV. 631 (1987)	31
Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95	33
II B. Schwartz, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (1965)	29
Slawson, *Constitutional and Legislative Considerations in Retroactive Rulemaking*, 48 CALIF. L. REV. 216 (1960)	38, 40
Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936)	33
J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (R. Rotunda & J. Nowak eds. 1987)	13
2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891)	38
L. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988)	33

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Supreme Court of Michigan (Pet. App. 1a-57a) is reported at 436 Mich. 515, 462 N.W.2d 555. The decision of the Michigan Court of Appeals (Pet. App. 58a-69a) is reported at 168 Mich. App. 444, 425 N.W.2d 174.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 28, 1990 (Pet. App. 1a) and a petition for rehearing was denied on December 5, 1990 (*id.* at 72a). The petition for a writ of certiorari was filed on March 5, 1991, and was granted on May 13, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and the Michigan workers' compensation statute are set forth at Pet. App. 88a-92a.

STATEMENT

From 1982 to 1987, petitioners—employers in the State of Michigan—satisfied their contractual obligations to pay workers' compensation benefits to disabled employees by making full payments in the amounts provided by the state workers' compensation statute as authoritatively construed by the Supreme Court of Michigan. In 1987, however, the Michigan legislature, expressly disagreeing with the state supreme court's construction of state law, enacted a new statute that retroactively increased the amount of workers' compensation benefits for payment periods back to 1982. The issue in this case is whether the 1987 law, imposing massive unforeseen financial obligations on employers, is consistent with the requirements of the Contract Clause and the Due Process Clause of the United States Constitution.

1. *The 1981 Statute.* During the late 1970s and early 1980s the State of Michigan was mired in an economic crisis. As Chief Justice Riley described the situation: "Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent, and the 1981 inflation rate for the City of Detroit in 1981 was 9.3 percent." Pet. App. 31a-32a (Riley, C.J., dissenting). It was against this economic backdrop that the Michigan legislature in 1981 passed a series of amendments to the Michigan Workers' Compensation Act. These changes were designed to curb expensive abuses in the system and thereby to "stimulate a poor state economy by lowering the cost of doing business in Michigan." *Id.* at 31a.

The primary abuse that the 1981 statute addressed was the ability of retired employees to collect workers' compensation benefits in addition to retirement benefits, and thereby to earn more money "disabled" than they would have received if they had never been injured. As the Michigan Supreme Court explained:

> For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." * * * If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. * * * In 1973 the Big Three (General Motors, Ford and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. * * * With such a large part of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded.

Franks v. *White Pine Copper Div.*, 375 N.W.2d 715, 724 (1985) (quoting official state study; citation omitted).

Indeed, in 1981, Michigan Governor William Milliken called the "retiree problem" the "biggest single liability to Michigan's job climate today." *Id.* at 723.

The Michigan legislature responded to this crisis by enacting 1981 PA 203 on December 30, 1981. This statute added MCL 418.354 to provide for the "coordination" of workers' compensation benefits with various other employee benefit programs funded by employers.[1] For example, the 1981 statute allowed employers to offset workers' compensation payments by the amounts that an employee was otherwise receiving from employer-financed pension plans, employer contributions to social security, or payments received from an employer-provided disability policy. Because of the coordination of benefits, employees would no longer be allowed to "receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job." *Franks*, 375 N.W.2d at 723 (quoting official state study). See A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 97.10 (1989) (an employee experiencing wage-loss due to three separate conditions—physical disability, economic unemployment, and old age—is still suffering only one wage-loss and should not receive three simultaneous sets of benefits).[2]

---

[1] This statute was one of a series of reforms Michigan instituted during 1980 and 1981. For example, in 1980, the legislature provided for coordination of workers' compensation benefits with unemployment benefits. See 1980 PA 357, MCL 418.358. Also in 1980, the legislature raised the maximum disability benefit for employees injured after January 1, 1982. See MCL 418.351. Another provision of the 1980 amendments created a state-funded cost-of-living supplement for employees injured between 1965 and 1979. See MCL 418.352. These supplemental benefits are not subject to coordination.

[2] As explained in the *amicus curiae* brief of the National Council of Self-Insurers in support of certiorari (at 2-5), coordination of benefits was recommended by the National Commission on State Workmen's Compensation Laws, was adopted by Congress in the Employment Retirement Income Security Act (see *Alessi* v. *Ray-*

2. *Interpretation of the 1981 Statute.* In *Chambers* v. *General Motors Corp.* (reported together with *Franks* at 375 N.W.2d 715 (1985)), the Michigan Supreme Court reviewed the plain language and history of the 1981 statute and held unanimously that the coordination provision applied to all workers' compensation payments made for disability periods *after* the statute's effective date of March 31, 1982, regardless of the date of the employee's injury. The court explained that coordination of future payments did not constitute a retrospective interference with any rights of the employees, because workers' compensation focuses on the workers' needs and status as of each new payment period. See *Chambers*, 375 N.W.2d at 722.

At the same time, however, the Michigan Supreme Court announced that employers could not reduce payments that they still owed employees for disability periods occurring *before* the coordination provision's effective date of March 31, 1982. To allow this type of retrospective coordination, the court explained, would retroactively (and hence impermissibly) adjust payments that were "due" and "payable" prior to the effective date of the statute. *Chambers*, 375 N.W.2d at 730.

3. *The 1987 Amendment.* During the mid-1980s, the economic climate in Michigan improved considerably. As Chief Justice Riley observed, in 1987 "[t]he level of unemployment was 8.2 percent (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent (down from the 1981 level of 9.3 percent)." Pet. App. 35a. Moreover, the Michigan legislature in 1987 was quite different from the one that had passed the coordination provision in 1981. Only 11 of the 26 senators and 20 of the 62 representatives who had voted for the 1981 statute were still in office. See *id.* at 36a.

---

bestos-Manhattan, Inc., 451 U.S. 504 (1981)) and the Social Security Act (see *Richardson* v. *Belcher*, 404 U.S. 78 (1971)), and has been accepted by 25 states in their workers' compensation programs.

In this changed economic and political environment, the Michigan legislature revisited the coordination issue in 1987 and enacted an amendment to the workers' compensation statute designed to overrule the Michigan Supreme Court's decision in *Chambers* and to disallow coordination of benefits for employees who had been injured prior to the 1981 statute's effective date of March 31, 1982. See Pet. App. 90a-92a. The amendment explicitly stated:

> The decision of the Michigan Supreme Court in [*Chambers*] is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability * * * for personal injuries occurring before March 31, 1982.

1987 PA 28, section 354, subsection 17.

The 1987 amendment did far more, however, than merely abolish coordination of *future* workers' compensation payments for employees disabled prior to March 31, 1982. The 1987 legislature also repealed the 1981 coordination provision *retroactively* by requiring employers to make *refunds*, with interest, to all employees whose benefits had been coordinated during the five-year period that the 1981 statute was in effect. See 1987 PA 28, section 354, subsections 19 & 20. Employers were given 60 days to make these massive refunds, which in the case of petitioners GM and Ford alone could amount to nearly $25 million. See Pet. App. 53a (Griffin, J., dissenting).

4. *The Romein and Gonzalez Cases.* Evert Romein was injured in 1977 during his employment with General Motors. Prior to the 1981 statute, Romein received social security and pension benefits as well as workers' compensation benefits on account of his disability. After the effective date of the 1981 statute, GM informed Romein that it would begin coordinating his workers' compensation benefits with these other employer-financed payments. Romein challenged this decision, and an administrative law judge ruled in his favor, holding that the coordina-

tion provision applied only to employees who were injured after its effective date of March 31, 1982. By the time the case was heard by the Workers' Compensation Appeal Board (WCAB), the Michigan Supreme Court already had rejected this argument in *Chambers*, and the WCAB therefore ruled that GM was entitled to coordinate payments to Romein for periods after the 1981 statute's effective date. Pet. App. 74a-80a.

Arturo Gonzalez, a Ford employee, began to receive workers' compensation benefits on January 1, 1981. On August 9, 1982, Ford informed Gonzalez that his benefits would be reduced in light of the 1981 statute. In September 1984, however, an administrative law judge ruled against Ford, holding that the coordination provision could not be applied to pre-1982 injuries. The WCAB affirmed. The Board concluded that although *Chambers* had construed the 1981 statute to permit the coordination of Gonzalez's benefits, that decision had been "reversed" by the 1987 amendment. Pet. App. 81a-87a.

5. *The Court of Appeals' Decision.* The *Romein* and *Gonzalez* cases were consolidated by the Michigan Court of Appeals, which held that retroactive application of the 1987 amendment did not violate the Due Process or Impairment of Contracts Clauses of the United States Constitution. Pet. App. 64a-66a. The court reasoned that "[t]he right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was revoked by the Legislature. What the Legislature gave, it could take away." *Id.* at 66a.

6. *The Michigan Supreme Court's Decision.* A divided Michigan Supreme Court affirmed. The majority first rejected petitioners' contention that the 1987 amendment violated due process. In the court's view, GM and Ford acquired no "vested rights" in the level of payments they had made because "workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature." Pet. App. 13a. The court recognized that the

> employers in this case held an expectation that the payments [made between 1982 and 1987] were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not.

Id. at 9a. The court found such a "rational relationship" by hypothesizing that the legislature may have wanted to ensure that employees who were not covered by a 1980 statute that increased benefits for injuries occurring after 1982 (see page 3, note 1, *supra*) would not be subject to coordination of benefits. Pet. App. 9a.

The Michigan Supreme Court also rejected petitioners' argument that the 1987 amendment worked an unconstitutional impairment of the contractual arrangements between employers and their employees. The court first ruled that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." Pet. App. 14a. Even if the Contract Clause applied, however, the court concluded that the 1987 legislation would survive scrutiny. To begin with, the court held that any impairment caused by the statute was not "substantial" because it did not destroy the "basic benefit" that employers received from the workers' compensation scheme—immunity from tort actions by their employees. *Id.* at 15a. In addition, the court suggested that any impairment was diminished by the "highly regulated" nature of the employment relationship. *Id.* at 15a-16a.

The Michigan Supreme Court next considered whether any impairment of contract could be justified by a "legitimate public purpose" and concluded that "[t]here is a significant state interest in protecting the right of disabled employees." Pet. App. 16a. Again speculating on the motivation for the 1987 amendment, the court stated that "[t]he Legislature could have reasonably found that

the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

Finally, the Michigan Supreme Court considered the "means by which the contracting parties' rights and responsibilities [were] adjusted" and determined that "[t]he means chosen here are reasonable in the light of deference given to legislative action." Pet. App. 17a. The court explained that "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Justice Brickley "reluctantly" concurred in the judgment. He stated that

> [t]roubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment.

Pet. App. 22a.

Justice Griffin dissented, based on his "strong view" that the 1987 amendment "contravenes the United States Constitution's Fourteenth Amendment due process guarantee." Pet. App. 47a. After reviewing some of the retroactive enactments that have survived judicial scrutiny in the past, Justice Griffin remarked that the "[l]egislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to * * * coordination regardless of the date of injury." *Id.* at 50a.

Chief Justice Riley dissented on state law grounds. She observed that the 1987 amendment "was nothing more than an attempt to 'overrule' the decision of this Court in *Chambers*, to render the *Chambers* opinion null and void, as if it was never released." Pet. App. 42a. In so doing, Chief Justice Riley concluded, "the Legislature has invaded the constitutional authority granted to the judicial branch and usurped the judicial function of determining the proper construction of a statute." *Id.* at 30a.

SUMMARY OF ARGUMENT

One of the cardinal purposes of the federal Constitution was to ensure a level of legal stability necessary for citizens to plan their affairs, secure in the expectation that their actions today would not be evaluated by different legal standards tomorrow. This concern with protecting citizens from "the fluctuating policy which has directed the public councils" (FEDERALIST No. 44 (Madison), at 282 (C. Rossiter ed. 1961)) manifested itself in a number of specific constitutional guarantees, including the Contract Clause and Due Process Clause. The Michigan Supreme Court ignored the dictates of these provisions, and this Court's decisions interpreting them, when it upheld the Michigan statute's retroactive requirement that petitioners reopen long-settled workers' compensation claims and make massive payments for past pay periods in addition to those required by the law in effect at the relevant time.

Petitioners and respondents entered into employment contracts that incorporated the terms of the workers' compensation laws. By retroactively upsetting those terms, the Michigan statute directly implicated the protections of the Contract Clause. The significant impairment brought about by the 1987 statute cannot possibly be viewed as insubstantial, and the Michigan legislature did not attempt to justify that impairment by asserting any important governmental interest. It follows that the statute is unconstitutional under the balancing test that this Court has applied in reviewing Contract Clause chal-

lenges in recent years. The statute is even more clearly unconstitutional under a legal standard that more faithfully reflects the original intent of the Framers.

The Michigan statute also violates the Due Process Clause because it constitutes a purely retroactive enactment the explicit purpose of which was to overrule the decision of an earlier legislature, as construed by the State's highest court, and to upset settled transactions and expectations. Although there may be occasions in which a legislature can proffer constitutionally acceptable justifications for a statute that includes a short period of retroactivity, neither the purpose nor the sweeping retroactive reach of the statute at issue here comes close to satisfying the criteria articulated in this Court's prior rulings.

ARGUMENT

I. THE 1987 MICHIGAN AMENDMENT VIOLATES THE CONTRACT CLAUSE, WHICH PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT

A. The Terms Of State Workers' Compensation Statutes Are Read Into Every Employment Contract And Thus Create Interests Protected By The Contract Clause

In holding that the retroactive increase in workers' compensation liabilities did not violate the Contract Clause, the Michigan Supreme Court relied on the ground that "the [employers'] expectation at issue here was not protected by the Contract Clause." Pet. App. 14a. This conclusion is plainly incorrect and cannot be reconciled with the numerous decisions of this Court that have applied the Contract Clause to contractual terms implied from state statutes.[3]

[3] The question whether an "obligation of contract" exists within the meaning of the Contract Clause, no less than the question whether there has been an "impairment" of that obligation, is a matter of *federal* rather than state law. As this Court explained in *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938), "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." The Court "must answer * * * [t]hese questions * * * independently of the conclusion of th[e state] court," for "we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration." *Appleby* v. *City of New York*, 271 U.S. 364, 379-380 (1926). See also, *e.g.*, *Municipal Investors Ass'n* v. *Birmingham*, 316 U.S. 153, 157 (1942); *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561-562 (1942).

This Court's Contract Clause decisions long have recognized that " 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' * * * This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977), quoting *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934), and *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867). In *Steamship Co.* v. *Joliffe*, for example, a state statute provided that a harbor pilot whose services were declined was entitled to receive half the pilotage fee; the purpose of the statute was to compensate the pilot "for the exertions and labor made * * * and the expenses and risks incurred * * * in placing himself in a position to render the services." 69 U.S. (2 Wall.) 450, 457 (1864). After plaintiff's services were refused, he sued in state court to recover the half-fee provided by the statute. Subsequent to commencement of the suit, however, the statute was repealed, which the state argued eliminated plaintiff's claim. The Court rejected this argument, emphasizing that plaintiff's right, by virtue of performance, was contractual rather than statutory in nature (*id.* at 456-457):

> The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less than a contract on that account. If the services * * * are declined, * * * [t]he transaction * * * between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract.

Because plaintiff's claim rested on "*quasi* contract" and had been "so far perfected [by performance] that nothing remains to be done by the party asserting it," "[i]t has become a vested right which stands independent of the statute." *Id.* at 458.

The Court has adhered to this analysis in cases specifically involving terms of employment implied from state statutes. In *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), a district attorney brought suit to recover his salary and fees in the amount set by statute. Although recognizing that the legislature could change such compensation prospectively (*id.* at 133), the Court held that plaintiff had a right under the Contract Clause to receive the amount specified in the statute for services already performed: "after the services have been rendered, under a law * * * which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate." *Id.* at 134. In reaching that conclusion, the Court expressly rejected the argument that the Contract Clause does not reach contractual obligations implied in law (*ibid.* (emphasis added)):

> The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid

> money, rendered service, or suffered loss at the request of or for the use of another, *the law completes the contract by implying an obligation* on the part of the latter to make compensation. *This obligation can no more be impaired by a law of the State than that arising on a promissory note.*

Thus, as the Court later reiterated in holding that a retroactive legislative reduction in an employee's statutorily-prescribed compensation violated the Contract Clause, performance pursuant to a statute "then in force [that established the parties' rights and duties] as construed by the highest court in the state" gives rise to "an implied contract * * *. And the constitutional protection [against the impairment of the obligations of contract] extends to such contracts just as it does to those specifically expressed." *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174, 179 (1928). See also *Koshkonong* v. *Burton*, 104 U.S. 668, 679 (1882); J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 499 (1987 ed.) (contracts "are express, or implied," and the Contract Clause "makes no distinction between the one class of contracts and the other").[4]

These principles apply with full force in the context of workers' compensation. The workers' compensation statute "is read into and becomes a part of the contract. The contract of employment, by virtue of the statute, contains an implied provision * * * [that] is a part of the compensation agreed to be paid for services rendered in the course of the employment." *State Industrial Comm'n*

---

[4] In a number of other cases, the Court similarly has held that the Contract Clause was violated by a statute modifying the law that was implicitly incorporated in a contract. See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362, 369-372 (1941); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 431-432 (1934); *Coombes* v. *Getz*, 285 U.S. 434, 442, 448 (1932); *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880); *Edwards* v. *Kearzey*, 96 U.S. 595, 601, 607 (1877); *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 317-318 (1873).

v. *Nordenholt Corp.*, 259 U.S. 263, 271 (1922) (quoting *Doey* v. *Howland Co.*, 120 N.E. 53, 54 (N.Y. 1918)). See also *Nacerima Co.* v. *Johnson*, 396 U.S. 212, 215 n.5 (1969). It is thus hardly surprising that the Michigan Supreme Court has repeatedly recognized in the past that "the basis for liability of employers under the Workmen's Compensation Statutes is contractual." *Selk* v. *Detroit Plastic Products*, 345 N.W.2d 184, 188 (Mich. 1984).[5]

Much like minimum wage statutes, workers' compensation laws establish minimum terms that are included (expressly or by implication from the statute) in every employment contract. Such statutes are not general police power regulations that govern businesses without regard to their contractual agreements to employ workers. Rather, the terms of workers' compensation statutes come into play only in conjunction with the contractual employment agreement. "Before benefits or rights under the workmen's compensation act can be claimed, an employer-employee relationship, established by a contract of employment, must be shown to exist." *Erickson* v. *Goodell Oil Co.*, 380 Mich. 207, 180 N.W.2d 798, 799 (1970); see also *Scott* v. *Alsar Co.*, 58 N.W.2d 910, 912 (Mich. 1953); 1C A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 47.10 (1990).

---

[5] See also, *e.g.*, *Lahti* v. *Fosterling*, 99 N.W.2d 490 (Mich. 1959); *Thomas* v. *Parker Rust Proof Co.*, 279 N.W. 504 (Mich. 1938); *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322 (Mich. App. 1984). In departing from this line of authorities, the court below purported to rely on *Chambers* v. *General Motors Corp.*, 375 N.W.2d 715, 723 (Mich. 1985), for the proposition that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause" (Pet. App. 14a). *Chambers*, however, held only that a legislative reduction in *future* benefit payments did not violate employees' constitutional rights. See 375 N.W.2d at 723; compare *id.* at 728-732 (in *Franks*, the Michigan Supreme Court held that workers' compensation benefits could not be retroactively reduced). Nothing in *Chambers* or in its unexplained extension in this case refutes the prior Michigan law that workers' compensation is an implied contractual term of employment.

The contractual nature of workers' compensation is highlighted by the fact that employers and employees (generally through their collective bargaining representatives) frequently bargain around the statutory minimums. For example, the contracting parties often bargain for enhanced disability benefits or agree to shape other benefit provisions, such as by decreasing pension or insurance benefits, to take account of workers' compensation levels. See, *e.g.*, Supplemental Agreement Covering Pension Plan, Art. IV, sec. 2, Appendix A to Agreement between GM and UAW (Mar. 21, 1982).[6] And employers take into account workers' compensation expenses (*i.e.*, insurance premiums or anticipated benefit payments for self-insured companies) when they calculate how much labor they can afford and when they bargain over wage rates and other benefits.

Of course, not every legislative modification of workers' compensation benefit levels is an unconstitutional impairment of contract, but the approach of the court below takes the law to the opposite and equally untenable extreme. In the Michigan court's view, *no* legislative change in benefit levels—even if enormously significant, completely retroactive, and severely disruptive of settled contractual expectations for a long-past period—would be subject to judicial scrutiny under the Contract Clause. That is not and cannot be the law. Surely if a state increased (or decreased) its minimum wage rate and made

---

[6] According to the Bureau of National Affairs' ongoing compilation of collective bargaining agreements, 27% of the contracts examined provided occupational accident insurance to supplement workers' compensation benefits. 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 44:4 (1991). Twenty-one percent of the agreements provided for long-term disability insurance (*ibid.*) and 70% made some provision for coordination of medical benefits with other insurance or government benefits. *Id.* at 44:9. Ninety percent of the contracts provided for disability pensions above and beyond workers' compensation, and in 17% of those contracts (26 out of 149) the parties agreed that workers' compensation benefits would be deducted from the disability retirement benefits. *Id.* at 48:3.

that increase (or decrease) retroactive to services already performed and paid for, employers (or employees) would have a Contract Clause claim. There is no reason why a different result should occur when the state retroactively increases another minimum statutory term of employment contracts—that relating to workers' compensation.

B. The Impairment In This Case Violates The Contract Clause

Perhaps because it recognized the tenuousness of its conclusion that no contractual interest was at stake here, the Michigan Supreme Court proceeded to decide whether the impairment caused by the 1987 amendment could be justified under the Contract Clause standard that this Court has adopted over the past several decades. See Pet. App. 15a-17a. As discussed below (see pages 28-36, *infra*), this Court's recent "balancing" test departs from the original understanding of the Contract Clause as applied during the first 150 years of the Nation's history. Because such a balancing approach is inconsistent with the text and purpose of the Clause, the Court may wish to reconsider its modern Contract Clause jurisprudence and return the Clause more securely to its historical roots.

Even without a revision in the governing standard, however, the retroactive 1987 amendment cannot pass constitutional muster. As we now show, because the statute worked a substantial and totally unanticipated increase in employers' liabilities for past periods, and because it neither addressed a broad and important public purpose nor adopted a reasonable means for achieving any such objective, the Contract Clause was violated.

1. *Under Existing Constitutional Standards, Michigan's Retroactive Increase In Employers' Liabilities For Workers' Compensation Benefits Violates The Contract Clause*

This Court has recognized "the high value the Framers placed on the protection of private contracts." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978). The Contract Clause was intended to safeguard

the reliance and expectation interests necessary to commercial interchange "by promoting confidence in the stability of contractual obligations." *United States Trust Co.*, 431 U.S. at 15.

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Steel, 438 U.S. at 245.

In recent years, the Court has developed a three-part balancing test to decide Contract Clause claims. Under this standard, the Court has weighed (1) the substantiality of the contractual impairment (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Steel*, 438 U.S. at 244); (2) the public purpose justifying the impairment (*Energy Reserves*, 459 U.S. at 412); and (3) the reasonableness of the means chosen to achieve that purpose (*United States Trust Co.*, 431 U.S. at 25). In upholding the 1987 amendment, the Michigan Supreme Court fundamentally misconceived each of these three factors.

a. *The Substantiality Of The Contractual Impairment.* "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment' " of a contractual right. *Energy Reserves*, 459 U.S. at 411, quoting *Allied Steel*, 438 U.S. at 244. The substantiality of the impairment must be evaluated in terms of "the legitimate expectations of the contracting parties." *United States Trust Co.*, 431 U.S. at 19 n.17.

The Michigan Supreme Court clearly erred in concluding (Pet. App. 15a) that the 1987 amendment—which imposed on GM and Ford as much as $25 million in additional workers' compensation liability for *closed benefit periods*—did not amount to a substantial impairment of contract rights. The amendment upset employers' settled expectations and justifiable reliance interests in three important respects.

First, in light of the 1981 statute, particularly as construed by the State's highest court in *Chambers*, employers were entitled to rely on their 1982-1987 coordinated workers' compensation payments to fully satisfy their legal obligations. See *Minnesota Ass'n of Health Care Facilities* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (the Contract Clause bars a retroactive (but not prospective) adjustment in nursing home rates because it imposed "totally unexpected liability on nursing homes for charges that were permitted by law when collected" and thus "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"). Here, the workers' compensation benefits at issue were "due and payable" (*Franks*, 375 N.W.2d at 730)—and in fact were paid—prior to the 1987 amendment. Especially since these benefits were computed on a periodic basis to compensate the employee for lost earnings *during that period*,[7] the reopening of benefits for closed periods violated well-established employer expectations of the most fundamental sort.[8]

Second, employers were entitled to rely on the existing workers' compensation program in making contemporaneous business decisions. The right to workers' compensation is one component of the employees' total wage and benefit package, and employers must be able to—and in Michigan in fact did (see page 15, *supra*)—take the required payment levels into account in setting overall employee compensation. Similarly, the cost of labor (including workers' compensation benefits) affects the quantity of labor employers purchase within the State and the

[7] Michigan workers' compensation benefits are payable weekly and are "geared to weekly wage loss." *Franks*, 375 N.W.2d at 731; see also MCL 418.301.

[8] If the Michigan legislature had sought to *reduce* workers' compensation benefits for such past periods, the retroactive impairment of the *employees'* settled expectations would analytically be no different. See *State ex rel. Cannon* v. *Moran*, 331 N.W.2d 369 (Wis. 1983).

relative capital investment choices (both short-term and long-term) they make. Labor expenses generally are an important element of the price at which the employer sells its products or services—a price that reflects the then-determinable cost of labor and cannot be adjusted years after the fact to recover subsequently enacted and retroactively applicable increases in such costs.

Third, employers were entitled to rely on the existing workers' compensation program in insuring against their risks for employee disability or death benefits. Under Michigan law, an employer is required either to self-insure against workers' compensation liability or to purchase insurance. See MCL 418.611. In either event, sound insurance practices can be followed only if the risks are reasonably ascertainable at the time the cost of the insurance is determined. See Am. Br. of Citizens Insurance Co. of America, *et al.* As this Court has recognized, "the element of reliance" is "vital" in funding insurance obligations, and "[d]rastic changes in the legal rules governing * * * insurance funds, like other unforeseen events," can disrupt the insurance program and even threaten its solvency. *Allied Steel*, 438 U.S. at 246-247. See also, *e.g.*, *Florida* v. *Long*, 487 U.S. 223, 235-236, 238-240 (1988).

The substantial impairment of employers' contractual expectations in this case is closely analogous to that held unconstitutional in *Allied Steel*. There, a 1974 Minnesota statute imposed a charge on employers if their pension funds were insufficient to provide full pensions for all employees who had worked at least 10 years—even those whose pension rights were not vested under existing law. The pension funds were composed solely of employer contributions, which were "based on actuarial predictions of eventual payment needs." 438 U.S. at 237. The Court concluded that the imposition of a "retroactive state-imposed vesting requirement" (*id.* at 247), which "super-impos[ed] pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake" (*id.* at 240), worked a "severe" impairment

of employers' contractual obligations (*id.* at 246) (emphasis added):

> The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract—one on which the company had relied for 10 years—was substantially modified. *The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.*

That reasoning is equally controlling here.

In holding that the 1987 amendment did not result in any "substantial" impairment of contract, the Michigan Supreme Court completely ignored the significant reliance interests of employers as recognized in *Allied Steel* and other Contract Clause decisions of this Court. Moreover, neither of the rationales offered by the court below justifies its conclusion.

The Michigan Supreme Court initially observed that the impairment of contract "cannot be said to be substantial" because the 1987 amendment "d[id] not alter th[e] basic benefit to the employer" of the workers' compensation system—immunity from employees' common-law tort claims. Pet. App. 15a. This reasoning is nonsensical; if accepted by this Court, it would allow a state legislature to impose any amount of retroactive workers' compensation liability on employers—or presumably to make any other retroactive modification of the workers' compensation system—provided only that employers remain free from tort suits. Contrary to the Michigan court's conclusion, this Court has expressly held that a "[t]otal destruction of contractual expectations is not necessary

for a finding of substantial impairment." *Energy Reserves*, 459 U.S. at 411, citing *United States Trust Co.*, 431 U.S. at 26 ("[t]he trial court's 'total destruction' test is based on what we think is a misreading of [the Clause]"). The relevant focus is on what the state has taken away from the contracting party, not on what it has left.

The Michigan Supreme Court also relied on the alternative argument that employers "knew that their rights were subject to alteration" because the "workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation." Pet. App. 16a. The fact that the employment relationship was "regulated," however, hardly negated the parties' reasonable expectation of finality with respect to *fully satisfied* claims for *past* disability periods. Indeed, the "regulatory" provisions of the Michigan workers' compensation statute specifically reinforced that expectation. The Act provides that benefits are payable weekly to compensate the employee for lost earnings during that week. See note 7, *supra*. It also states that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]." MCL 418.833(1); see also *Franks*, 375 N.W.2d at 730 (refusing to allow retroactive coordination of benefits for pre-1982 periods). Under this scheme, it was well understood that past benefit payments were final and closed.

In fact, in the 75-year history of workers' compensation in Michigan, this was the *first* time the legislature had ever sought to reopen past claim periods to increase employer liability. Given the nature of these periodic payments as compensation for lost wages on an ongoing (and often extended) basis, benefits payable in the future have been and must be capable of adjustment in light of then-existing economic conditions. But payments already due and payable (and in fact paid) to assist employees for periods many years past have never been thought to be, and never have been, subject to reopening.

Thus, Michigan employers had a justifiable expectation that their liability for *past* periods could not be retroactively increased.[9]

Accordingly, the 1987 amendment substantially impaired the contractual rights of Michigan employers. "The severity of the impairment * * * increase[s] the level of scrutiny to which the legislation will be sub-

[9] The Michigan Supreme Court suggested (Pet. App. 11a-12a) that, notwithstanding its earlier unanimous ruling in *Chambers*, Michigan employers should have anticipated a legislative amendment to the coordination provision. This Court has recognized, however, that citizens, in planning their affairs in conformity with existing law, "cannot foresee and ought not to be required to guess the outcome of pending measures [in the legislature]." *Untermyer* v. *Anderson*, 276 U.S. 440, 445-446 (1928). In this case, in any event, employers surely had no reason to expect a *retroactive* increase in *past* benefit payments: the 1987 amendment did not contain a retroactive reimbursement clause until eight days prior to its enactment. See Pet. 16 n.5; J.A. 36-46. It may be that, in its reference to notice, the court below had in mind the resolutions passed by the Michigan House and Senate in 1982 interpreting state law to preclude coordination of benefits for persons injured prior to March 31, 1982. See Pet. App. 3a & n.2. But those resolutions were not binding, and the 1982 legislature in fact defeated a proposal—voted on *after* the adoption of the resolutions—that would have amended the law to disallow prospective coordination. See *id.* at 36a-37a & n.16.

Nor were an employer's reasonable expectations left entirely unprotected, as the court below believed (Pet. App. 14a), simply because the employer had not obtained a judgment fixing the amount of its liability. Employers (including petitioners) were involved in extensive litigation to determine their rights under the 1981 statute, which led to the Michigan Supreme Court's controlling decision in *Chambers*. Once the 1981 statute had been so interpreted, there was no reason for employers to litigate the issue further simply to secure a formal judgment; indeed, the court below itself recognized in *Chambers* that employers did not need to resort to the judicial process before coordinating their employees' benefits. See 375 N.W.2d at 726. It would be perverse to hold that employers who conformed completely to the requirements of the 1981 statute and the authoritative decision of the Michigan Supreme Court forfeited the protections of the Contract Clause (or Due Process Clause) merely because they did not reduce their extant state-law rights to judgment.

jected" under the Contract Clause. *Energy Reserves*, 459 U.S. at 411. Because of the substantiality of the impairment in this case, the Court should undertake "a careful examination" (*Allied Steel*, 438 U.S. at 248) of the remaining two factors: the significance and legitimacy of the public purpose supporting the impairment, and the reasonableness of the means adopted by the State to further that purpose. Both factors weigh heavily against the constitutionality of the Michigan enactment.

b. *The Significance And Legitimacy Of The Underlying Public Purpose.* If, as in this case, "the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411. The Michigan Supreme Court concluded that this requirement was met because there was a legitimate "public purpose" for the 1987 amendment: "rather than merely providing a benefit to special interests, the state is validly exercising its police power * * * [in furtherance of the] significant state interest in protecting the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim." Pet. App. 16a.

The Michigan Supreme Court's rather nonchalant and conclusory assertion of a legitimate state interest, if accepted by this Court, would largely eviscerate the protections of the Contract Clause. As the Court explained in *Allied Steel*, "[i]f the Contract Clause is to retain any meaning at all * * * it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, *even in the exercise of its otherwise legitimate police power*." 438 U.S. at 242 (second emphasis added); accord *United States Trust Co.*, 431 U.S. at 21-22; *Wood* v. *Lovett*, 313 U.S. 362, 372 (1941). By looking no further than the presence of "a legitimate state interest" (Pet. App. 17a), the court below collapsed the Contract Clause into the Due Process Clause, contrary to this Court's admonition that "the limitations imposed on States by the Contract Clause" must be "con-

trasted * * * with the less searching standards imposed on economic legislation by the Due Process Clauses." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 732-733 (1984).

Indeed, in many respects the 1987 amendment was the very type of legislation designed to benefit a discrete and narrow class that this Court has held to violate the Contract Clause. *See Allied Steel*, 438 U.S. at 248-249 ("this law can hardly be characterized * * * as one enacted to protect a broad societal interest rather than a narrow class"); *Energy Reserves*, 459 U.S. at 412 (the Court must ensure that the state is not simply "providing a benefit to special interests"). The 1987 statute did not constitute general legislation that only incidentally affected obligations under various types of private contracts. To the contrary, as Justice Griffin noted in dissent (Pet. App. 50a), the statute was "deliberately designed to disrupt retroactively past transactions" between employers and employees. Thus, as in *Allied Steel*, the statute's "sole effect was to alter contractual duties." *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 192 (1983) (describing *Allied Steel*). This statute therefore stands in marked contrast to that upheld in *Exxon*, which

> did not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance "a broad societal interest" * * *. The prohibition applied to all oil and gas producers, regardless of whether they happened to be parties to sale contracts * * *.

Id. at 191-192. Moreover, again as in *Allied Steel*, the 1987 amendment benefited only a limited and particularized group of employees—here, employees injured prior to 1982 who, alone among all employees, sought to continue to "double dip" despite their receipt of a full array of social security and retirement benefits. See *Cooper* v. *Wicomico County*, 398 A.2d 1237, 1241 (Md. 1979) ("simply to increase the amount of a previously finalized award of compensation to meet the employee's 'generalized need for funds' would appear to rest on a tenuous constitutional foundation").

The Michigan Supreme Court also was unable to point to anything in the legislative history of the 1987 amendment to show that the Michigan legislature determined that it was acting for a significant and legitimate public purpose. The most the court could say was that the legislature "could have reasonably found" that coordination resulted in hardship for certain workers and that the amendment corrected a "perceived inequity." Pet. App. 17a. The court's speculative assumptions, however, cannot cure the lack of a legislative record tying the 1987 amendment to a pressing public need and are insufficient to sustain the statute's substantial impairment of contract. See *Allied Steel*, 438 U.S. at 248 n.19 (declining to accept the state supreme court's "mere speculation as to the state legislature's purpose").

Of course, such speculation is unnecessary here. Simply put, this case arises because the 1987 Michigan legislature reconsidered the 1981 coordination-of-benefits policy in light of 1987 political and economic circumstances (see pages 2-5, *supra*) and, not content to change the policy for the future, purposely acted to upset settled contractual relations by increasing employers' liabilities for closed past periods. Retroactively readjusting contract terms to favor one party over the other is precisely what the Contract Clause forbids.

c. *The Reasonableness Of The Means.* Even "the existence of an important public interest is not always sufficient to overcome th[e] limitation [of the Contract Clause]." *United States Trust Co.*, 431 U.S. at 21. In addition, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 22; see also *Energy Reserves*, 459 U.S. at 412. In this case, there was absolutely "no showing in the record before us that this severe disruption of contractual expectations [caused by the 1987 amendment] was necessary to meet an important general social problem," and therefore the "presumption favoring 'legislative judgment as to the

necessity and reasonableness of a particular measure' simply cannot stand." *Allied Steel*, 438 U.S. at 247, quoting *United States Trust Co.*, 431 U.S. at 23.

The Michigan Supreme Court concluded that the means chosen by the legislature were reasonable because the 1987 "statute imposes no more retroactive liability than is necessary to" effectuate its goal. Pet. App. 17a. Even a cursory examination of the 1987 amendment, however, reveals that it was not a reasonable way of dealing with any problem that may have faced employees whose benefit levels were not increased by the unrelated statutory changes that took effect at the beginning of 1982.

As the Michigan legislature candidly acknowledged (see page 5, *supra*), the purpose of the 1987 amendment was retroactively to reverse *Chambers*, a decision the legislature declared "to have been erroneously rendered." See Pet. App. 34a-35a (Riley, C.J., dissenting). Apparently realizing that such a rationale could not survive scrutiny under either the Due Process Clause or the Contract Clause, the court below—without any support in the legislative record—hypothesized a new rationale for the law: to provide additional compensation to employees "whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

In fact, the fit between this after-the-fact rationale and the 1987 amendment is so poor that it is doubtful the amendment was designed to deal with this issue at all. The 1987 statute helped only the least deserving subset of employees injured prior to 1982—retirees who were able to "double dip" into workers' compensation and retirement benefits. Surely, if the legislature had intended to assist employees whose benefits were not increased in 1982, the 1987 statute would not have been so arbitrarily limited. Instead, it would have more broadly increased the benefit level of *all* employees who were injured prior to 1982. In any event, contrary to the Michigan court's critical assumption, many of the retirees who benefited

from the 1987 amendment had in fact received substantial, non-coordinated increases (ranging from 10.3% to 86.6%) in their workers' compensation benefits in 1982 under the supplemental compensation scheme that went into effect that year. See page 3, note 1, *supra*; *Garvie* v. *Owens-Illinois, Inc.*, 67 Mich. App. 133, 421 N.W.2d 602 (1988). If the goal had been to help only those employees who were not receiving increased benefits, extension of the supplemental benefit program—not retroactive reversal of coordination of benefits—would have been the rational means of accomplishing that end.

In sum, the 1987 amendment was hardly a legislative reaction to a sudden and unanticipated social or economic problem. Rather, it was shaped entirely to reverse a policy decision that had been made in the 1981 statute as authoritatively interpreted by the state supreme court. Although the 1987 legislature was entitled to have a change of heart about whether coordination of benefits should be allowed for employees injured prior to 1982, it had a constitutional duty to "make [the change] prospective, but not retroactive." *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880).

This conclusion is strongly reinforced by the consistent line of this Court's decisions holding that, under the Contract Clause, a statutory change in the express or implied terms of a contract may not be applied retroactively to alter obligations that already have been performed and become final. In particular, once the terms of an employment contract have been satisfied, the respective rights of the parties have accrued for that period and are not subject to retroactive modification by a subsequent state statute.

In *Mississippi ex rel. Robertson* v. *Miller*, *supra*, for example, after an official performed services pursuant to a statute specifying his compensation, the statute was amended to reduce the authorized pay for services already rendered. The Court unanimously held that this retroactive interference with accrued contract rights violated the Contract Clause:

> Under the statutes then in force as construed by the highest court of the State, [plaintiff] thereupon became entitled to the specified * * * [compensation]. The retroactive application of [the repealing statute] would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions.

Robertson, 276 U.S. at 179. See also *Fisk*, 116 U.S. at 134; *Joliffe*, 69 U.S. (2 Wall.) at 457-458.[10]

The Contract Clause principles embodied in these precedents are controlling here. Workers' compensation benefits during 1982-1987 were paid by employers and received by employees in full compliance with then-existing law as authoritatively construed by the Michigan Supreme Court and impliedly incorporated in the employment contracts between the parties. Because those contractual payments had become final and closed, the 1987 amendment could not retroactively increase them.

2. *The Court Should Restore The Original Understanding Of The Contract Clause In Accordance With Its Language, History, And Policies*

As demonstrated above, application of the Court's existing Contract Clause jurisprudence is sufficient to reverse the judgment below. That jurisprudence, however, has been subject to considerable criticism in recent years on the ground that it has strayed from the original understanding of the Clause. See, *e.g.*, *Chicago Bd. of Realtors, Inc.* v. *City of Chicago*, 819 F.2d 732, 743-744 (7th Cir. 1987) (opinion of Posner and Easterbrook, JJ.) ("[t]he Supreme Court * * * has rewritten the contract clause,

[10] For other cases in which the Court has invalidated retroactive statutes under the Contract Clause, see, *e.g.*, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938); *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936); *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936); *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934); *Coombes* v. *Getz*, 285 U.S. 434 (1932); and *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891).

by inserting the word 'unreasonably' before impairing"); II B. Schwartz, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 306 (1965); E. Corwin, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 362 (1953); Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 598 (1987). Indeed, these criticisms have become so sustained that the Court recently found it necessary to deny that the Clause had become "a dead letter" (*Allied Steel*, 438 U.S. at 241) and that its protections had been "'balanced away'" (*United States Trust Co.*, 431 U.S. at 29 (citation omitted)).

We submit that the Court's current approach is out of harmony with the constitutional text, structure, history, and purpose of the Contract Clause. The seeds of this error may be traced to the analysis (although not the holding) in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), in which the Court expressly put aside the literal language of the Contract Clause (*id.* at 428), ignored the context of the Clause and its conjunction with the Ex Post Facto and Bill of Attainder Clauses (*id.* at 426-427), and disregarded the history and purpose of the Clause as being "of little aid" (*id.* at 427). In place of those authoritative guides to constitutional meaning, the Court turned to its "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Id.* at 442.

Blaisdell itself was a narrow decision, upholding by a 5-4 vote a Minnesota emergency moratorium on mortgage foreclosures in response to the post-depression crisis facing the State and the country. In so ruling, the Court repeatedly stressed the "temporary" and "emergency" nature of the provision (290 U.S. at 416, 439-440, 444-445) and rested its decision on "the relation of emergency to constitutional power." *Id.* at 425. Indeed, within a few months of *Blaisdell*, the Court unanimously invalidated an Arkansas statute under the Contract Clause, explaining

that, unlike the Minnesota statute, the Arkansas law was not intended to deal with an emergency and was "neither temporary nor conditional." *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 434 (1934).

Despite the limited nature of the *Blaisdell* holding, the Court subsequently has construed the decision to authorize a multi-factor balancing approach in assessing challenges to state legislation under the Contract Clause. See, *e.g.*, *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987). During the first 150 years of the Nation's existence, by contrast, the Clause was construed as a virtually "absolute bar" to retroactive impairments of contractual obligations (*United States Trust Co.*, 431 U.S. at 19 n.17) and was "perhaps the strongest single constitutional check on state legislation." *Allied Steel*, 438 U.S. at 241; see also *Keystone Coal*, 480 U.S. at 502. These decisions reflect "the high value the Framers placed on the protection of private contracts" (*Allied Steel*, 438 U.S. at 245) and the Contract Clause's "important place in our constitutional jurisprudence" (*United States Trust Co.*, 431 U.S. at 15).

In restoring the Contract Clause to its proper place in the constitutional structure, the appropriate starting point is the text of the Constitution. Article I, Section 10, Clause 1 provides in pertinent part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

The language of the Contract Clause is straightforward; although the Clause, like all constitutional provisions, is subject to judicial interpretation, it surely gives no suggestion of the kind of balancing test employed in the Court's modern decisions.[11] Moreover, the placement of

[11] Other provisions of the Constitution, by contrast, are drawn in qualified or conditional terms. For example, Article I, Section 10, Clause 2 prohibits a state (without the consent of Congress) from "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." And of course the Fourth Amendment forbids "unreasonable" searches and seizures, while the Eighth Amendment bars "excessive" bail and "excessive" fines. Thus, the Framers well knew how to draft appropriate language when they intended to create flexibility or exceptions.

the Contract Clause with the Bill of Attainder and Ex Post Facto Clauses—both of which have been applied by the Court in accord with their language—reinforces the text of the Contract Clause and illuminates the constitutional values that the Clause protects.[12] See Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HAST. CONST. L. Q. 525, 544 (1987); Palmer, *Obligations of Contract: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 635-646 (1987).

In general, the Framers of the Constitution sought to promote the stability of society through the rule of law. James Madison, for example, inveighed against the "calamit[ies]" of "mutable policy"; in such circumstances, he objected, "no man, who knows what the law is today, can guess what it will be tomorrow." FEDERALIST NO. 62 (Madison), at 381 (C. Rossiter ed. 1961). As Madison explained, this concern over "the fluctuating policy which has directed the public councils" specifically underlay the Contract Clause.

> The sober people of America * * * have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. * * * They very rightly infer, therefore, that some thorough reform is wanting, which will * * * give a regular course to the business of society.

[12] In fact, Madison discussed together and treated as an integrated provision the prohibitions against bills of attainder, ex post facto laws, and impairments of contract, regarding all three types of legislation as "contrary to the first principles of the social compact and to every principle of sound legislation." FEDERALIST No. 44, at 282 (C. Rossiter ed. 1961).

FEDERALIST NO. 44, at 282-283. Alexander Hamilton likewise supported the Clause as an " 'eagerly embraced' " " 'preventative' " against " '[t]he too frequent intermeddlings of the state legislatures in relation to private contracts.' " C. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 180 (1961) (citation omitted).

The debates over the Contract Clause at the Constitutional Convention reveal the Clause's essential nature. See generally McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 278-281 (1988). The Clause originated in a proposal by Rufus King of Massachusetts. In support of the Clause, James Wilson of Pennsylvania explained that "*retrospective* interferences only are to be prohibited." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 440 (M. Farrand ed. 1911). At that point Madison inquired whether such protection was provided by the prohibition of ex post facto laws, and Edward Rutledge of South Carolina then successfully moved a substitute provision to bar states from enacting ex post facto laws and bills of attainder. The next day, however, John Dickenson of Delaware noted that Blackstone had limited ex post facto laws to criminal statutes and that under that interpretation the Constitution "would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." 2 RECORDS OF THE FEDERAL CONVENTION, at 448-449. Thereafter, the Committee on Style proposed the Contract Clause in its current form, which the Convention adopted without further debate.

This constitutional history demonstrates that the Contract Clause—like the Ex Post Facto Clause from which it was derived and with which it is joined—was designed to promote stability and predictability by absolutely prohibiting *retroactive* changes in the governing law. See *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212 (1827); S. Miller, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 536 (1893) ("[t]he objectionable feature of the legislation which we have discussed, where a legislative body attempted to exercise some authority over existing contracts, was that it was retrospective or retroactive"); Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 918 (1982) ("[t]he vice the Framers had meant to attack [in the Contract Clause] was retroactive legislation"); Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95, 114 ("the Contract Clause was intended to fill the gap as an ex post facto clause on the civil side, at least so far as contractual obligations were concerned"). By guarding against retroactive interference with contractual rights, the Contract Clause was designed to be a "centerpiece" of the constitutional protection of private rights (L. Tribe, AMERICAN CONSTITUTIONAL LAW 588 (2d ed. 1988)) and was, as Charles Pinckney of South Carolina observed at the time, " 'the soul of the Constitution.' " McConnell, 76 CALIF. L. REV. at 284 (citation omitted).[13]

Retroactive laws are of two types. Some laws are purely retrospective: they "reach 'back to attach new legal rights and duties to already completed transactions.' * * * [Such a statute] alters the legal consequences of past events *as of the time of those events*," McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 58-59 (1967) (emphasis in original), quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV.

[13] The Framers were well familiar with the general principle that legislatures are to enact prospective statutes. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *Calder* v. *Bull*, 3 U.S. (3 Dall.) at 388, 397. As one leading commentator has described the prevailing English and American law at the time: "Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780, 789 n.42 (1936).

692, 692 (1960). An example of a purely retroactive enactment is a "law making prior contracts, valid when signed, invalid for all purposes from the date of execution." McNulty, 55 CALIF. L. REV. at 58 n.144. As Justice Scalia has explained, this type of retroactive law "alter[s] the *past* legal consequences of past actions" and "change[s] what was the law in the past." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 219, 220 (1988) (Scalia, J., concurring). Such a law may be said to be retroactive in the "primary" (or "strong") sense of the term.

Other laws contain elements of both retroactivity and prospectivity. They "purport to have only post-enactment effect [but]may also be classified as retroactive insofar as they bear importantly on prior events by affecting their future legal consequences as of the time the new law is adopted. Such retroactivity is illustrated by a statute declaring pre-existing obligations unenforceable in the future." McNulty, 55 CALIF. L. REV. at 59. These laws are retroactive in the "secondary" (or "weak") sense of the term.

Laws that operate retroactively in the primary sense to impair contractual obligations should be held to violate the Contract Clause without more. In the criminal context, those laws plainly would violate the Ex Post Facto Clause, and they entail exactly the evil—a retroactive change in the governing legal rules—that the Contract Clause was intended to guard against. In light of the language and history of the Contract Clause, it is difficult to conceive of a legitimate justification for such purely retrospective laws. See Kmiec & McGinnis, 14 HAST. CONST. L. Q. at 544; Merrill, 37 CASE W. RES. L. REV. at 629; see also *Kaiser Aluminum* v. *Bonjorno*, 110 S. Ct. 1570, 1586 (1990) (Scalia, J., concurring) ("[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal" and "has long been a solid foundation of American law").

This Court consistently has invalidated laws that are retroactive in the primary sense. See page 28 & n.10, *supra*.

Laws that are retroactive in the secondary sense are less amenable to categorical characterization. On the one hand, such laws, by establishing new legal consequences for previously arranged activities, often do upset reasonable contractual expectations and thus come within the concerns as well as the text of the Contract Clause. See, *e.g.*, *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936) (statutory release of surety bond, as applied to contractual bonds in existence when statute was enacted, violates Contract Clause); *Edwards* v. *Kearzey*, 96 U.S. 595 (1877) (statutory increase in debtor's property exempt from creditor remedies, as applied to contracts existing when statute was enacted, violates Contract Clause). As retrospective legislation, they should be subject to stricter scrutiny and call for a substantially greater governmental justification than this Court's modern cases have required; for private as for public contracts, a state should not be "free to consider impairing the obligations of * * * contracts on a par with other policy alternatives." *United States Trust Co.*, 431 U.S. at 30-31. See also *id.* at 32 (Burger, C.J., concurring).[14]

---

[14] It bears emphasis that the Framers adopted the Contract Clause despite objections that it would unduly restrict state authority. See McConnell, 76 CALIF. L. REV. at 278-279. For example, Gouverneur Morris of Pennsylvania opposed the Clause on the ground that it was "going too far" and that the "majority must rule." 2 THE RECORDS OF THE FEDERAL CONVENTION, at 439-40. George Mason of Virginia also took issue with the Clause, arguing that "[t]his is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential." *Ibid.* See also *ibid.* (Madison acknowledged that "inconveniences might arise" from the Clause but believed that "on the whole it would be overbalanced by the utility of it"). And Luther Martin, who had been a member of the Constitutional Convention, objected in the Maryland House of Delegates that "there might be times of such great public calamities and distress * * * as should render it the duty of a government * * * to inter-

On the other hand, there is an unquestioned need for the states, in the exercise of their legitimate police power, to be able to regulate *future* conduct even if that may interfere with some contractual expectations. The rule is rightly established that private parties cannot, through foresightful contracting, obtain absolute immunity from otherwise proper state authority. See, *e.g.*, *Allied Steel*, 438 U.S. at 241-242; *Blaisdell*, 290 U.S. at 435-436. For example, consistent with the Contract Clause, a state may prohibit activities that are contrary to the public health and safety notwithstanding existing private contracts to engage in such (previously lawful) conduct. See, *e.g.*, *Beer Co.* v. *Massachusetts*, 97 U.S. at 25 (1877).

This general analysis need not be elaborated further here, for the core principle is sufficient for the Court to dispose of this case. The 1987 amendment was a retroactive statute in the primary sense: it applied a new rule of law to past transactions that were governed by a different rule at the time they were conducted. As such, it was, under the foregoing standard, a plain violation of the Contract Clause.

In the end, this case turns out to be an easy one under either the existing Contract Clause standard or under an approach more faithful to the origins of the Clause. But the justification for returning to the original understanding of the Clause extends well beyond the outcome of this particular litigation. By applying that understanding to invalidate the 1987 amendment, the Court will provide important guidance to the lower courts and begin the process of returning the Contract Clause to its intended role in our constitutional system.

---

fere"—a power that concededly, however, "ought only to be exercised on very important and urgent occasions." 3 THE RECORDS OF THE FEDERAL CONVENTION, at 214-215. This history strongly indicates that the Contract Clause was understood to be quite stringent if not absolute in its prohibition; at the least, a permissive balancing test has no support in the historical record. See Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 924 n.23 (1984) ("[m]odern courts have ignored the fact that Madison's views, not Martin's, prevailed at the Constitutional Convention").

II. THE 1987 MICHIGAN AMENDMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Purely Retroactive Laws That Change The Legislative Policy Governing Completed Transactions Violate Due Process

Much that we already have said serves to establish the 1987 amendment's inconsistency with the substantive requirements of the Fourteenth Amendment's Due Process Clause. This Court long has recognized that considerations of reliance and legitimate expectations must be taken into account in assessing the constitutionality of retroactive legislation under the Clause; while due process principles necessarily accord legislatures substantial leeway in drafting laws that bear on economic interests, affected parties nevertheless can, as Judge Learned Hand explained, "expect * * * that courts will intervene when the defeat of their expectations passes any measure that reasonable persons could think tolerable." *Cohan* v. *Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930). Judged by this standard, the 1987 amendment plainly "is so harsh and oppressive as to transgress the constitutional limitation." *Welch* v. *Henry*, 305 U.S. 134, 147 (1938).

In assessing the constitutionality of the 1987 amendment, its remarkable character bears emphasis. As Chief Justice Riley explained (Pet. App. 46a), the 1987 Michigan legislature decided that its 1981 predecessor simply put the wrong policy in place when it chose to coordinate workers' compensation benefits for employees injured prior to 1982. The 1987 legislature accordingly transported itself back in time by enacting what the Michigan Supreme Court acknowledged to be a "'purely retroactive'" statute (*id.* at 11a) that reopened and reassessed long-settled transactions under a new rule of law. And the legislature did so, as Justice Brickley explained, "notwithstanding the fact that those rights and liabilities had already been determined by an earlier and different body of agents of an earlier majority, determinations which the Legislature in 1983, 1984, 1985 and 1986 declined to change." *Id.* at 27a.

Legislation of this sort works an extraordinary interference both with the settled expectations of affected parties and, more generally, with what Justice Story described as "the fundamental principles of the social compact." 2 J. Story, COMMENTARIES ON THE CONSTITUTION 272 (5th ed. 1891). If the 1987 amendment is as easily supportable as the court below imagined, legislators would be free to determine, for example, that their long-ago predecessors had erred in cutting tax rates, and could remedy the perceived error by requiring taxpayers to recalculate many years worth of tax liability as though different rates had been in effect throughout the intervening period. Indeed, the principle represented by the 1987 amendment logically would mean that a newly installed legislature could "'recount' * * * all legislative voting that had occurred during the preceding two years, substituting the votes of the new representatives for those of their predecessors" (Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 445); by providing that the views of the new legislators should be treated as having been in effect for the prior two years, the sitting legislature could retroactively recast the entire legal landscape.

That sort of rootless lawmaking fails the fundamental test of due process: it disregards considerations of fairness derived from "'the basic values that underlie our society.'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-123 (1989) (plurality opinion) (citation omitted). After all, as our discussion above makes clear, "nothing seems more basic to the existence of a legal order than the ability to rely upon the actions of others, including the government, with some assurance." Slawson, *Constitutional and Legislative Considerations in Retroactive Rulemaking*, 48 CALIF. L. REV. 216, 225 (1960).

1. *Purely Retroactive Legislation Is Presumptively Unconstitutional*

a. *Purely Retroactive Laws Are Unconstitutional When They Change Legislative Policy.* The rules governing the constitutionality of statutes such as the 1987 amendment, in which the legislature determined that its predecessor adopted the wrong policy and therefore retroactively changed the law governing *past* conduct, have long been settled. In the leading case concerning such retroactive legislation, *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), local authorities collected a toll from a ship passing through a canal, although they lacked statutory authority to do so. Two years later, as a refund suit was proceeding, the state legislature enacted a statute purporting retroactively to validate collection of the toll—a statute that, like the one at issue here, modified liability attaching in the past to a completed transaction. See *id.* at 338-339. This Court held the statute unconstitutional.

Writing for a unanimous Court, Justice Holmes explained:

> [I]f the [state legislature] had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

258 U.S. at 339. Distinguishing cases like *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907), where a legislature was permitted retroactively to cure a defect in a statute by conforming a tariff to past administrative practice, the Court in *Forbes* explained that retrospective ratification of administrative acts is supportable only when the party opposing retroactivity is seeking to take advantage of "some slight technical defect" in the existing legislation or is advancing a position that is "contrary to some strongly prevailing view of justice." 258 U.S. at 339.

In subsequent years the Court has continued to draw this line between permissible, "curative" ratification of administrative practice and unconstitutional attempts retroactively to change the basic thrust of legislation.

In *Graham & Foster* v. *Goodcell*, for example, the Court stated that "a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects *in the administration of government* where the remedy can be applied without injustice." 282 U.S. 409, 429 (1931) (emphasis added). And more recently, Justice White (joined by Justice Blackmun) explained that "*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting from dismissal of appeal). The rationale for this distinction is clear enough: reliance interests are not threatened when curative legislation, by ratifying "[l]ong-continued and substantial administrative and private conduct," simply "restores a situation that was affirmatively anticipated and provided for." Slawson, 48 CALIF. L. REV. at 238, 239. Needless to say, that is not the case when the retroactive law involves a fundamental and unexpected change in legislative policy.

This reluctance to undo settled transactions through retroactive legislation that changes settled policy is reflected in almost universal legislative and judicial practice. For over a century, Congress and the state legislatures have given *limited* retroactive effect to tax and related statutes; that practice precludes persons from arranging their affairs to evade the impact of pending (and thus anticipated) legislation. See, *e.g.*, *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984); *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981). But so far as Congress is concerned, "[t]his 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation." *Ibid.*

Indeed, the furthest the Court has gone in upholding the constitutionality of *any* such retroactive law, state or federal, is *Welch* v. *Henry*, *supra*, where a taxpayer received dividend income in 1933 and filed an income tax return in 1934; the state legislature, which sat in odd-numbered years, imposed a tax on the dividend income in 1935, at its next general legislative session. See 305 U.S. at 142, 150-151. In affirming the 1935 tax statute's constitutionality, the Court emphasized that the legislature had enacted the law "at the first opportunity after the tax year in which the income was received." *Id.* at 151. The Court explained that, "in view of well established legislative practice, both state and national, taxpayers could not

> justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income *at the first opportunity* after knowledge of the nature and amount of the income is available. And we think that the "recent transactions" to which this Court has declared a tax law may be retroactively applied must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.

Id. at 149-150 (emphasis added) (citation omitted). The Court added that, "[w]hile the [state supreme court below] thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it." *Id.* at 151.

Welch appears to mark the outer boundary of permissible purely retroactive legislation. Other than legitimate "curative" cases such as *Heinszen*, there is no decision of this Court—and (with the exception of the ruling below) we are not aware of any decision of any other court [15]—affirming the authority of a legislature to reach back beyond the session of its immediate predecessor. To

---

[15] None of the various federal decisions cited by Justice Brickley (see Pet. App. 24a) involved purely retroactive laws analogous to the 1987 amendment; they considered legitimate curative legislation or laws imposing prospective burdens.

the contrary, several courts have expressly held that such a temporal limit is compelled by the dictates of due process. See *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980); *Commonwealth* v. *Budd Co.*, 108 A.2d 563, 568-569 (Pa. 1954). There is no reason to doubt that this remains the law; in its most recent analysis of the issue, the Court, citing *Welch*, explained that "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation.'" *McKesson Corp.* v. *Division of Alcoholic Beverages*, 110 S. Ct. 2238, 2252 n.23 (1990). This nearly universal disfavor for purely retroactive legislation reaching back beyond a legislative term bears strongly on the due process inquiry: it suggests that such laws disturb interests that are "deeply rooted in reason and in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952).

b. *Purely Retroactive Laws Burden Legitimate Expectations.* The suspect status of purely retroactive statutes is simply an application of the broader recognition that the destruction of expectations—and the legitimacy of public reliance on the undertakings of government—may call into question the fundamental fairness of statutes having retroactive consequences. In its recent decisions, the Court has upheld the constitutionality of laws according *prospective* effects to past conduct—what we have described above (see page 34, *supra*) as laws that are retroactive in the "secondary" sense—by inquiring into the rationality of the legislation. See *United States v. Sperry Corp.*, 110 S. Ct. 387, 390-391, 392 (1989); *United States* v. *Locke*, 471 U.S. 84, 105-106 (1985); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). But as Justice Scalia has noted, the scrutiny even in such cases has involved "a rationality requirement beyond that applied to other legislation." *Bowen*, 488 U.S. at 223 (Scalia, J., concurring).

In particular, the Court consistently has suggested that considerations of notice and "reliance upon the current state of the law" must be taken into account in assessing the validity of retroactive legislation. *Turner Elkhorn*, 428 U.S. at 17. See *id.* at 17 n.16; *id.* at 41 (opinion of Powell, J.). The Court thus several times has struck down statutes that imposed unanticipated taxes on past transactions. *Helvering* v. *Helmholz*, 296 U.S. 93, 97-98 (1935); *Coolidge* v. *Long*, 282 U.S. 582, 596, 605-606 (1931); *Untermyer* v. *Anderson*, 276 U.S. 440, 444-445 (1928); *Nichols* v. *Coolidge*, 274 U.S. 531, 543 (1927). Of course, an inquiry that looks to reliance interests necessarily involves something more than a simple application of the "rational basis" test—at least in its usual sense of finding a general congruence between statutory means and ends—because a legislature may have rational purposes for enacting a retroactive statute notwithstanding the existence of demonstrable reliance interests in existing law. This suggests that, even with regard to laws attaching prospective consequences to past conduct, a balancing of public and private interests (of the sort conducted in other substantive due process settings) may be appropriate.[16]

However that may be, the reasons for treating purely retroactive legislation as at least presumptively unconstitutional are manifest. The exigencies of governing require that lawmakers have the authority to adapt prospective legislation to existing circumstances, even though such legislation may disrupt expectations; "constitutional principles must leave some play to the joints of the machine." *Forbes*, 258 U.S. at 340. And the understanding that legislatures may take such prospective action (or impose limited retroactivity to prevent the evasion of pending legislation) serves to obviate somewhat the role of reliance in such cases. See *Darusmont*, 449 U.S. at 297; *Welch*, 305 U.S. at 149-150.

---

[16] See, *e.g.*, *In re Marriage of Fabian*, 224 Cal. Rptr. 333, 337-340 (Cal. 1988); *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 871 (R.I. 1987). Cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 (1982).

In contrast, the usual operation of government hardly requires the reformulation of rules in a manner, as Justice Griffin described the 1987 amendment, "deliberately designed to disrupt retroactively *past* transactions." Pet. App. 50a (emphasis added). At the same time, affected parties surely will have relied on the finality of transactions that were closed long before the current legislature came into being; those transactions and their consequences will have worked their way into the fabric of the parties' subsequent actions. In addition, the invalidation of purely retroactive legislation does not call for the exercise of subjective judgment by the judiciary, a concern that has troubled the Court in other contexts involving substantive due process. See *Michael H.*, 491 U.S. at 121-122 (plurality opinion). To the contrary, judicial disfavor of such legislation "reinforces rather than subverts representational decisionmaking" by giving effect to the choices made by the then-sitting legislature to govern contemporaneous transactions. Eule, 1987 AM. B. FOUND. RES. J. at 446. As Justice Brickley aptly observed, it is purely retroactive legislation itself, not its judicial invalidation, that poses the greater threat "to our system of republican government." Pet. App. 22a.

2. *The 1987 Amendment Does Not Comport With The Requirements Of Due Process*

Application of these principles to the 1987 amendment establishes the law's unconstitutionality. As the Michigan Supreme Court acknowledged, the statute is purely retroactive (see Pet. App. 9a, 11a); it is precisely equivalent in its effect to a retroactive tax increase going back five years across four legislative sessions. And as we have explained (see pages 18-19, *supra*), Michigan employers plainly relied on then-existing law in making their pricing and related business decisions, in setting levels of compensation, in implementing investment choices, and in providing for the funding of their insurance obligations. The court below conceded that "the employers in this case held an expectation that the payments were completed transactions" (Pet. App. 9a), although it went on to

hold that those expectations were legally irrelevant to the due process analysis. *Id.* at 9a-11a. That legal conclusion, however, cannot be reconciled with this Court's decisions discussed above.

Moreover, despite the "curative" label placed on the 1987 amendment by the state legislature (see Pet. App. 12a), the statute cannot be saved as an attempt to ratify administrative practice or conform the law to the general understanding, as was true in *Heinszen*; "[t]o say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts." *Forbes*, 258 U.S. at 340. In fact, petitioners immediately understood the 1981 law to permit coordination of benefits for workers injured before March 31, 1982, and a unanimous Michigan Supreme Court subsequently confirmed that understanding in *Chambers*. Thus, as Chief Justice Riley noted (and the majority below did not dispute), "the legislative history of [the 1981 law] clearly contradicts the claim of the 1987 Legislature that [the 1987 amendment] provided the original intent of the 1981 Legislature." Pet. App. 37a. As a law that effectuates a naked change in approach, the 1987 amendment accordingly runs afoul of the principle that "legislative policy may not be changed retroactively" in the guise of curative legislation. *Van Emmerik*, 454 U.S. at 1133 (White J., dissenting from dismissal of appeal).

The Michigan Supreme Court's principal response to these points was its assertion that liability for workers' compensation may be retroactively modified because, as a matter of state law, the entitlement to specific levels of compensation is set by statute and therefore is not "vested" (Pet. App. 12a-13a). The court added that judgments entered under the 1981 law *are* vested and therefore "are immune from this legislative modification." *Id.* at 14a. That state law permits the legislature *prospectively* to modify (or eliminate) entitlement to workers' compensation, however, hardly establishes that the imposition of many years' worth of *retroactive* monetary

liability comports with due process. In fact, the distinction drawn by the court below—and, in this setting, the concept of "vesting" itself—is not meaningful.

As a leading commentator has observed, "it has long been recognized that the term 'vested right' is conclusory —a right is vested when it has been so far perfected that it cannot be taken away by statute." Hochman, 73 HARV. L. REV. at 696. Thus, while references to vested rights occasionally appear in this Court's retroactivity decisions (see, *e.g.*, *Welch*, 305 U.S. at 147; *Graham & Foster*, 282 U.S. at 429; *Coolidge*, 282 U.S. at 596), the term apparently has been used to signify nothing more than that the relevant transactions had been completed at the time that the retroactive legislation was enacted.[17] That certainly is the case here: petitioners had long since paid workers' compensation for particular periods, as required by statute, thus fully satisfying their then-current obligations. And so far as reliance (the only relevant consideration) is concerned, it cannot possibly matter that petitioners, after litigating the issue and obtaining an authoritative judgment from the state's highest court settling the conformity of their conduct with the law, failed to take the pointless step of reducing each of their individual workers' compensation obligations to judgment. See page 22, note 9, *supra*.

The final ground offered by the court below to justify retroactivity—that the 1987 amendment affects the amount of benefits rather than the employers' basic obligation to pay (see Pet. App. 13a)—is equally insubstantial. This Court has drawn that distinction in holding statutes *unconstitutional* when they retroactively imposed levies on voluntary transactions that previously had been

[17] State courts have applied the concept in that way in striking down retroactive laws. See, *e.g.*, *Thorp* v. *Casey's General Stores*, 446 N.W.2d 457, 462-463 (Iowa 1989); *Potomac Hospital Corp.* v. *Dillon*, 329 S.E.2d 41, 45 (Va. 1985); *State ex rel. Briggs & Stratton Corp.* v. *Noll*, 302 N.W.2d 487, 491-493 (Wis. 1981); *Brown* v. *Commonwealth*, 566 A.2d 913 (Pa. Commw. Ct. 1989).

entirely exempt from taxation, even when the retroactivity reached only to periods falling within the session of the *enacting* legislature; in contrast, the Court has held that increases in the rates of existing taxes during such periods may be anticipated and therefore are consistent with due process. See *Welch*, 305 U.S. at 147; *Untermyer*, 276 U.S. at 445; *Nichols*, 274 U.S. at 542. See generally *Turner Elkhorn*, 428 U.S. at 17 n.16. That principle obviously does not justify the wholly unprecedented (and thus, necessarily, unexpected) increase in rates for periods many years in the past.

The Michigan Supreme Court also purported to find support in this Court's decisions in *Turner Elkhorn* and *Gray* (see Pet. App. 7a-12a), but it plainly misread those decisions. The court below suggested that the legislation at issue in *Turner Elkhorn* altered "liability for past, completed transactions." *Id.* at 11a. In fact, however, that legislation attached *prospective* consequences to past events by requiring compensation for future periods of disability; "the effect of the legislation is to impose a *new* duty or liability based on past acts." 428 U.S. at 15-16 (emphasis added). For its part, *Gray* is an unexceptional application of the principle that retroactivity is permissible if " 'confined to short and limited periods' " so as to "prevent [affected parties] from taking advantage of a lengthy legislative process * * * while Congress debated necessary revisions in the statute." 467 U.S. at 731 (citation omitted). For reasons we have already discussed, that situation bears no resemblance to this case.[18]

[18] We recognize that *Gray* contains language indicating that due process is satisfied "[p]rovided that retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." 467 U.S. at 729. But *Gray* cannot plausibly be read to eschew altogether consideration of reliance in assessing the constitutionality of retroactive legislation—a holding that would have overruled decisions such as *Helmholz* and *Untermyer*. Indeed, *Gray* itself left open (albeit with some lack of enthusiasm) whether timely notice of pending retroactive legislation is constitutionally required. See *id.* at 731-732. And Justice Brennan, author of the Court's opinion in *Gray*, subsequently noted for

B. The 1987 Amendment Is Arbitrary And Irrational

Because the 1987 amendment is retroactive in the primary sense, stretches back many years to impose a new rule of law on closed transactions, and severely upsets settled expectations, it should be held to violate the Due Process Clause without more. In any event, the relationship between the statute's means and ends is so inexact—and the lines the law draws are so "arbitrary and irrational" (*Turner Elkhorn*, 428 U.S. at 15)—that the amendment cannot survive application even of the ordinary rational basis test, as applied to retroactive legislation.

That conclusion is confirmed by the Court's decision in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935). There, observing that the law at issue "resurrect[ed] for new burdens transactions long since past and closed" (*id.* at 350), the Court invalidated retroactive legislation requiring employers to finance pensions for former railroad employees who, while not employed by a railroad at the time of the statute's enactment, had been so employed during the prior year. See *id.* at 344-345. Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo (while dissenting on other points) agreed that this retroactive feature of the legislation was "arbitrary" and therefore unconstitutional. *Id.* at 389 (Hughes, C.J., dissenting).

The Court in *Turner Elkhorn* distinguished *Alton* on the ground that, unlike the discredited railroad pension legislation, "[t]he point of the black lung benefit provisions [at issue in *Turner Elkhorn*] is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee la-

---

a unanimous Court in *McKesson* that purely retroactive legislation may "violate due process by unduly interfering with settled expectations." 110 S. Ct. at 2252 n.23. The 1987 amendment, of course, does precisely that.

bored." 428 U.S. at 19. See also *Gray*, 467 U.S. at 733. Here, however, *Alton* is squarely on point. While in terms modifying the workers' compensation program, the 1987 amendment did not respond to "a specific need created by the dangerous conditions under which the former employee labored." To the contrary, in its actual operation the statute does nothing more than permit retirees to "double dip" by collecting full pension *and* full workers' compensation benefits—in effect, as in *Alton*, "increas[ing] or supplement[ing] a former employee's salary to meet his generalized need for funds." *Turner Elkhorn*, 428 U.S. at 19; see *Gray*, 467 U.S. at 733.

Indeed, the 1987 amendment goes well beyond the provision held unconstitutional in *Alton*. The railroad retirement law attached prospective consequences to past terms of employment; the statute at issue here, of course, is purely retroactive. And while the Court has reserved judgment on the continuing vitality of *Alton* (see *Turner Elkhorn*, 428 U.S. at 19; *Gray*, 467 U.S. at 733), the decision reached in that case by a unanimous Court surely compels the conclusion that, absent some special need, it is arbitrary for a legislature retroactively to require that employers increase general levels of compensation.

That the 1987 amendment does not rationally serve the purposes attributed to the legislature is made clear by the notable lack of congruence between the statutory means and ends. The Michigan Supreme Court hypothesized that the intended beneficiaries of the 1987 statute are workers "who did not receive the increases in the legislative reform packages of 1980 and 1981" (Pet. App. 9a; see *id.* at 17a), a group that includes all persons injured prior to 1982. But the statute does not target its benefits to the entire class of persons in that category. Instead, it assists only those workers who were injured during the relevant period *and* who fortuitously were eligible to collect their pensions. As we explain above (see pages 26-27, *supra*), those "double-dippers" were the group *least* in need of increased assistance.

At the same time, the size of the retroactive payments mandated by the 1987 amendment belies the law's hypothesized purpose. Workers' compensation payments are geared to weekly wage loss, thus compensating for lost earnings. Payments under the 1987 amendment, however, are measured by the size of the workers' pensions, sums that have no necessary relation to the wages lost during periods for which compensation is due. In these circumstances, the mismatch between the statutory means and ends is so great as "necessarily [to] cast[] considerable doubt upon the proposition that the [law] could rationally have been intended" to serve the goals assumed by the state court. *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 537 (1973). See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 440 (1982) (opinion of Blackmun, J.).

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

RODERICK D. GILLUM
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

Counsel for Petitioners

JULY 1991

No. 90-1390

SUPREME COURT
OF THE UNITED STATES
October Term, 1990

Supreme Court, U.S.
FILED
SEP 5 1991
OFFICE OF THE CLERK

GENERAL MOTORS CORPORATION,

Petitioner,

v

EVERT ROMEIN and MICHIGAN ATTORNEY GENERAL FRANK J. KELLEY,

Respondents.

FORD MOTOR COMPANY,

Petitioner,

v

ARTURO GONZALEZ and MICHIGAN ATTORNEY GENERAL FRANK J. KELLEY,

Respondents.

On Writ of Certiorari
to the Supreme Court of Michigan

BRIEF FOR RESPONDENT MICHIGAN ATTORNEY GENERAL

FRANK J. KELLEY
Attorney General

GAY SECOR HARDY
Solicitor General

THOMAS L. CASEY
Assistant Solicitor General
Counsel of Record
Appellate Division
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I

WHETHER A 1987 MICHIGAN STATUTE RETROACTIVELY PROHIBITING A REDUCTION IN THE LEVEL OF WORKERS' COMPENSATION BENEFITS AND REQUIRING EMPLOYERS TO REFUND BENEFITS WHICH HAD BEEN IMPROPERLY REDUCED VIOLATES THE IMPAIRMENT OF CONTRACTS CLAUSE (Art I, § 10) OF THE UNITED STATES CONSTITUTION?

II

WHETHER A 1987 MICHIGAN STATUTE RETROACTIVELY PROHIBITING A REDUCTION IN THE LEVEL OF WORKERS' COMPENSATION BENEFITS AND REQUIRING EMPLOYERS TO REFUND BENEFITS WHICH HAD BEEN IMPROPERLY REDUCED VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 10

ARGUMENT

I THE CONTRACTS CLAUSE DOES NOT APPLY TO THE MICHIGAN STATUTE GOVERNING WORKERS' COMPENSATION BENEFIT LEVELS 15

Applicability Of The Contracts Clause Is A Federal Question, But The Court Should Give Considerable Deference To State Law 15

Michigan's Statutory Workers' Compensation Benefits Are Not Subject To The Contracts Clause 18

II THE MICHIGAN WORKERS' COMPENSATION STATUTE DOES NOT VIOLATE THE CONTRACTS CLAUSE 37

Petitioners' Criticism Of Current Contracts Clause Jurisprudence Is Unwarranted 37

Page

The 1987 Amendments To Michigan's Workers' Compensation Law Were Legitimate Exercises Of The State's Police Power And Do Not Violate The Contracts Clause 45

1. There Has Been No Substantial Impairment Of A Contractual Relationship 48

2. The 1987 Amendments Have A Significant And Legitimate Public Purpose 52

3. The Means Used To Effectuate This Legitimate Public Purpose Are Reasonable 55

III THE 1987 AMENDMENTS TO THE MICHIGAN WORKERS' COMPENSATION STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE 56

CONCLUSION 64

TABLE OF AUTHORITIES

Pages

Federal Cases

Allied Structural Steel Co v Spannaus, 438 US 234 (1978) ...33,46,52

Appleby v City of New York, 271 US 364 (1926) 17,18

Cudahy Packing Co of Nebraska v Parramore, 263 US 418 (1923) 26

Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400 (1983) .....passim

Hale v Iowa State Board of Assessment and Review, 302 US 95 (1937) 15,16

Home Building & Loan Ass'n v Blaisdell, 290 US 398 (1934) ....passim

Hudson Co v McCarter, 209 US 349 (1908) 20

Indiana, ex rel Anderson v Brand, 303 US 95 (1938) 16,17

Irving Trust Co v Day, 314 US 556 (1942) 15

Manigault v Springs, 199 US 473 (1905) 46

Pension Benefit Guaranty Corp v Gray & Co, 467 US 717 (1984) 57,59,62,63

Pages

Phelps v Board of Education, 300 US 319 (1937) 16

Railroad Retirement Board v Alton R Co, 295 US 330 (1935) 61,62

Usery v Turner Elkhorn Mining Co, 428 US 1 (1976) .....passim

W.B. Worthen Co v Thomas, 292 US 426 (1934) 41

State Cases

Allen v Kalamazoo Paraffine Co, 312 Mich 575 (1945) 24,29

Crilly v Ballou, 353 Mich 303 (1958) 26

Franks, 422 Mich 636 (1985), reh den 424 Mich 1202 (1985) 9

Franks v White Pine Copper Div, 422 Mich 636 (1985) .....passim

Harrington v Department of Labor & Industry, 252 Mich 87 (1930) 22

Henry v Ford Motor Co, 291 Mich 535 (1939) 22

Lahti v Fosterling, 357 Mich 578 (1959) .....passim

Matter of Schmidt v Wolf Contracting Co, 269 App Div 201; 55 NYS2d 162 (1945) 30

Pages

Romein v General Motors Corp,
436 Mich 515 (1990) .....passim

Selk v Detroit Plastic Products,
419 Mich 1 (1984),
on resubmission,
419 Mich 32 (1984) 31,33,34

Tarnow v Railway Express Agency,
331 Mich 558 (1951) 24,27

Thomas v Parker Rust Proof Co,
284 Mich 260 (1938) 21,42

Constitution and Statutes

U.S. Const, Art I, § 10 .....passim

MCL 418.131; MSA 17.237(13) 2,50

MCL 418.301(1); MSA 17.237(301)(1)... 2

MCL 418.352; MSA 17.237(352) 7,53

MCL 418.354; MSA 17.237(354) 4

Michigan Public Acts

1912 PA 10 1

1943 PA 245 1

1980 PA 357 4

1980 PA 357, § 352 7

1981 PA 192-203 4

1987 PA 28 10

STATEMENT OF THE CASE

Respondent Michigan Attorney General agrees with and adopts the "Counterstatement of the Case" contained in the Brief for Respondents Romein and Gonzalez, but wishes to emphasize the following points:

1. As originally enacted in 1912 (1912 PA 10), Michigan's workers' compensation system was voluntary. Employers had the option to elect coverage under the Act, and employees had the option to decline coverage. In 1943 (1943 PA 245) the Act was amended to make workers' compensation compulsory for virtually all employers. As explained in Argument I in this brief, this change from a voluntary to a mandatory system had fundamental implications for Contracts Clause analysis.

2. For an employee who receives a personal injury "arising out of and in

the course of employment", the statutory right to recovery of workers' compensation benefits "shall be the employee's exclusive remedy against the employer." MCL 418.301(1); MSA 17.237(301)(1), MCL 418.131; MSA 17.237(13). As described in Lahti v Fosterling, 357 Mich 578, 585 (1959):

> The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work.

The primary purpose of Michigan's workers' compensation system is to provide, through a highly regulated statutory system of weekly benefit payments,

income protection for injured workers during the time of loss of wage earning capacity. The Michigan Supreme Court described the public policy underlying this system in Franks v White Pine Copper Div, 422 Mich 636, 654 (1985):

> Workers' compensation benefits are social-welfare income-maintenance benefits. Workers' compensation is the first or progenitor safety net providing a means of income maintenance for persons who have met misfortune or whose regular income source has been cut off. All the social welfare programs--workers' compensation, unemployment compensation, social security old age, disability, and survivors benefits, no-fault automobile benefits, aid to families with dependent children, and general assistance--are directed to the same objective, income maintenance. All these programs are funded by impositions on employers and others of mandatory payments (to the government, insurers or, in the case of the self-insured, to the beneficiary), with statutorily prescribed benefits. In providing for such benefits, the Legislature did not covenant not to amend the legislation.

3. In a statute enacted in 1980 (1980 PA 357) and a package of twelve statutes enacted in 1981 (1981 PA 192-203) the Michigan Legislature engaged in a "comprehensive reform" of the workers' compensation system to correct perceived defects. Franks, 422 Mich at 649-650. The instant litigation involves a challenge to one aspect of this reform, the coordination of benefits provisions, which permit employers to reduce workers' compensation benefits by an amount based upon other employer-financed income replacement benefits such as social security benefits and pensions. MCL 418.354; MSA 17.237(354). The concerns underlying the coordination of benefits provisions were described in a report prepared for the Michigan Senate as part of the legislative history of the statute, as an

effort to "... reduce the overlap between the various public and private wage replacement programs while ensuring adequate wage-loss benefits to injured employees." (quoted in Franks, 422 Mich at 656).

Despite Petitioners' pejorative characterization of the prior system (alleging that injured employees such as Respondents Romein and Gonzalez were "the least deserving subset of employees" who had been able to "double dip", Petitioners' Brief, p 26), it is readily apparent that the debate surrounding the coordination provisions merely reflected the latest in a continuing series of policy choices made by the Michigan Legislature in the evolutionary process of shaping Michigan's workers' compensa-

tion system. The Michigan Supreme Court in the instant case recognized that adoption of the coordination of benefits provisions was the result of a policy decision by the Legislature as part of a broad compromise among various interests, Romein v General Motors Corp, 436 Mich 515, 521 (1990):

> This statute was part of a legislative reform package involving a series of related amendments of the workers' compensation statute. The coordination provisions were an essential component of a compromise plan that restructured benefits payable to disabled workers. The resources saved as a result of this coordination were reallocated by the statute to increase benefit levels generally, from two-thirds of the average weekly wage to 80 percent of after-tax wages, effective for injuries occurring after January 1, 1982.

Similarly, the court had previously noted that as part of the legislative effort to balance the interests of employers and

employees the 1980 statute (1980 PA 357, § 352; MCL 418.352; MSA 17.237(352)) provided state-funded supplements for workers injured in the years between 1965 and 1979. The court observed that the reform package "may not have resulted in perfect equity for everyone", but nevertheless it represented "a reasoned legislative attempt to reconcile fairly the various interests of workers injured at different dates with the economic needs of this state." Franks, 422 Mich at 660, fn. 19.

4. After enactment of the 1981 package of reform statutes, a few employers--notably Petitioners General Motors and Ford--applied the coordination provisions to workers injured prior to 1982 as well as to workers injured after 1982. Petitioners did so at their peril, knowing

full well that such action was hotly contested. The statute was silent on the question of retroactive application, and Petitioners themselves only adopted their current interpretation as a litigation tactic after the statute became effective (the statute was effective on March 31, 1982, yet Petitioner General Motors did not attempt to apply it to Respondent Romein until September 28, 1983, Romein, 436 Mich at 521). Petitioners' interpretation of retroactive application was disputed by a resolution of both houses of the Michigan Legislature in 1982 (Senate Concurrent Resolution No. 575, discussed at Franks, 422 Mich at 659) and was consistently rejected in administrative hearings and by the Michigan courts until the Michigan Supreme Court's decision in Franks became final after rehear-

ing was denied on December 30, 1985. Franks, 422 Mich 636 (1985), reh den 424 Mich 1202 (1985).

5. Throughout their brief (see e.g., Petitioners' Brief, pp 2-5) Petitioners rely upon statements contained in the dissenting opinion filed by Michigan Supreme Court Chief Justice Riley in the instant case, Romein, 436 Mich at 547-564, in arguing for the existence of an "economic crisis." Such reliance, however, is both misplaced and irrelevant. Initially it must be observed that Chief Justice Riley dissented from the majority opinion solely on state law grounds, not upon the federal constitutional positions which Petitioners assert in this Court.

To the extent that Petitioners General Motors and Ford imply that their

voices were not heard by the Michigan Legislature in 1987 their argument is simply not credible. Changes in Michigan's economic conditions between 1981 and 1987, and changes in the membership of the Michigan Legislature between 1981 and 1987, are simply irrelevant to the constitutional questions which are at issue in this litigation. Either 1987 PA 28 violates the Contracts Clause or the Due Process Clause, or it does not; that outcome does not depend upon the economic backdrop or the identity of the legislators who voted for the statute.

SUMMARY OF ARGUMENT

In 1980 and 1981 the Michigan Legislature enacted thirteen bills in a comprehensive revision of the Michigan workers' compensation system to correct

perceived defects. This package of bills was the result of extensive negotiations and compromises between many competing interests and represented merely the latest in a continuing series of policy choices made by the Michigan Legislature in the evolutionary process of shaping Michigan's workers' compensation system. One of the statutes enacted in this revision package permitted employers to reduce workers' compensation benefits for workers who were receiving benefits from other employer-financed income replacement programs such as pensions.

In a surprising and unexpected decision in 1985, the Michigan Supreme Court held that these "coordination" provisions would be applied not only to claims based upon injuries occurring after the effec-

tive date of the statute, but also to the benefits of workers who had been injured earlier and who were receiving benefits on the date the statute became effective. In 1987 the Michigan Legislature passed a statute to correct the effects of the judicial decision by prohibiting employers from reducing workers' compensation benefit levels for employees who had been receiving benefits on the effective date of the 1981 statute, and ordering employers who had made such reductions to refund, with interest, any amounts which had been improperly reduced.

The history of the evolution of Michigan's workers' compensation statutes, and their judicial interpretation by the Michigan courts, make it clear that workers' compensation benefit levels

are not legitimate contractual expectations protected by the Contracts Clause of the United States Constitution. Under Michigan law, such benefit levels are exclusively controlled by statute and may be modified by the Legislature, despite the expectations of employers and employees. In making its independent determination of whether the Michigan statutes are subject to the Contracts Clause this Court should defer to the determinations of this question by the Michigan courts.

Even if the Contracts Clause does apply to these statutes, however, they do not unconstitutionally impair the obligation of contracts. The Court's Contracts Clause jurisprudence properly accommodates the legitimate exercise of the sov-

ereign right of the State to protect the lives, health, morals, comfort and general welfare of its people. The workers' compensation reform statute at issue in this case does not substantially impair any contractual relationship of Petitioners, it promotes the legitimate public purpose of protecting the right of disabled employees to receive the full compensation intended by the Legislature, and it achieves that result through reasonable means.

The retroactive portions of the Michigan statutes do not violate due process rights since they are justified by the rational legislative purpose to protect the benefit levels of disabled workers who did not receive other increases in benefit levels in the legislative reform packages of 1980 and 1981.

ARGUMENT

I

THE CONTRACTS CLAUSE DOES NOT APPLY TO THE MICHIGAN STATUTE GOVERNING WORKERS' COMPENSATION BENEFIT LEVELS.

Applicability Of The Contracts Clause Is A Federal Question, But The Court Should Give Considerable Deference To State Law.

It is undisputed that when a state statute is challenged upon the ground that it impairs the obligation of a contract, this Court has the ultimate authority to determine the existence of the contract and the nature and extent of its obligation. Irving Trust Co v Day, 314 US 556, 561 (1942); Hale v Iowa State Board of Assessment and Review, 302 US 95, 101 (1937): "The power is ours, when the impairment of an obligation is urged against a law, to determine for ourselves the effect and meaning of the contract as well as its existence."

It is also beyond dispute, however (although Petitioners do not appear to recognize it), that in making its determination this Court gives great weight to the determinations made by state courts. Hale, 302 US at 101 ("Even so, we lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong."); Phelps v Board of Education, 300 US 319, 322-323 (1937):

> This Court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. *** Unless those views are palpably erroneous we should accept them.

In Petitioners' Brief, pp 10-11, n. 3, Petitioners cite Indiana, ex rel

Anderson v Brand, 303 US 95, 100 (1938), and Appleby v City of New York, 271 US 364, 379-380 (1926), for the principle that this Court has the ultimate authority to decide the question. By selectively quoting only portions of sentences, however, Petitioners carefully avoid mention of the principle that this Court gives considerable deference to state court determinations, although both of those cases support this principle, as shown by the following quotations in their proper context:

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.
> Indiana, ex rel Anderson, 303 US at 100 (footnote omitted).

These questions we must answer independently of the conclusion of that [State] court. Of course we should give all proper weight to its judgment, but we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. Appleby, 271 US at 379-380.

Michigan's Statutory Workers' Compensation Benefits Are Not Subject To The Contracts Clause.

As Petitio[illegible] recognized in their Petition (Petit[illegible] pp 11-14), there is variation among the states concerning whether state workers' compensation statutes are subject to the Contracts Clause. Because the ultimate determination of whether the Contracts Clause applies lies with this Court, and because such systems will undoubtedly be subject to a Due Process analysis, such statutes will not evade constitutional review. Respondent

Attorney General submits that workers' compensation is not an area in which nationwide uniformity regarding the applicability of the Contracts Clause is necessary.

In the instant case the Michigan Supreme Court held that Petitioners' expectations regarding the level of workers' compensation benefits are not contractual expectations protected by the Contracts Clause. Romein, 436 Mich at 533-534. Respondent Attorney General submits that this Court should defer to this determination, particularly since it is consistent with the history of the development of Michigan's workers' compensation system and is consistent with numerous prior decisions by the Michigan Supreme Court.

Coverage under a workers' compensation system is conditioned on the employment relationship which is contractual in nature, but the mere existence of a contract does not necessarily implicate the Contracts Clause. As Justice Holmes said in Hudson Co v McCarter, 209 US 349, 357 (1908): "One whose rights, such as they are, are subject to state restriction, can not remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

In Michigan, the first workers' compensation system enacted in 1912 was voluntary and contractual. The contractual nature of Michigan's elective workers' compensation system under the 1912 statute is exemplified by the deci-

sion in Thomas v Parker Rust Proof Co, 284 Mich 260 (1938), cited in Petitioners' Brief at p 14, n. 5. In Thomas the employer had elected to operate under the provisions of the act and the employee had not exercised his right of rejection so the court held: "The provisions of the workmen's compensation act are, in effect, read into the contract of employment between the employer and the employee" and "both are bound by the provisions of the act". 284 Mich at 266. The act did not then provide for damages for injury caused by an occupational disease and because the common law had not recognized such a cause of action, the court held that the act did not take away a right of action and there was no impairment of the obligations of the contract of employment. 284 Mich at 267,

269. Even under this voluntary system, however, once an employer and employee had agreed to be covered by the act, they were not free to modify the compensation provided by the act, Harrington v Department of Labor & Industry, 252 Mich 87, 89 (1930):

> Compensation is not a private matter between employer and employee. The public is interested. The act declares a State policy that the burden of industrial accidental personal injuries shall be borne by the industries, not by the general public. To effectuate this policy, the act provides for frequent regular payments, weekly, not monthly, or quarterly, or annually. It opposes payments in gross or in lump sum, except in certain "special circumstances." Subject to its limitations, it contemplates weekly payments of compensation during disability, no more, no less.
>
> In short, an agreement respecting compensation, to merit approval, must follow and conform to the provisions of the act.

This language in Harrington was cited in Henry v Ford Motor Co, 291 Mich 535,

540 (1939), in which the court held that an employee who had received unemployment compensation benefits after being laid off was also entitled to workers' compensation benefits as a result of a work-related injury. 291 Mich at 541:

> Both awards are purely statutory and while there is no question about some incongruity in the provisions, nevertheless we are bound by the wording of the statutes. The remedy is with the legislature who alone can provide for deductions or denial of compensation under one act or the other. (emphasis added).

Despite the recognition that there was an overriding public interest in the subject area of workers' compensation and despite the recognition that the terms of the statute were controlling, Michigan courts also recognized that, at least to some extent, workers' compensation under the then elective statute retained some

aspects of contractual rights. For example, in Tarnow v Railway Express Agency, 331 Mich 558 (1951), the court held that an employee who had been injured in 1938, when the elective act was in place, was entitled to certain additional compensation benefits after the 1943 amendments, despite the fact that the terms of the 1943 statute would have precluded such benefits. The court said that the right to such further compensation was a contractual right which accrued to him when the accident happened and that the provision of the Workmen's Compensation Act then in effect were a part of the contract of hire. 331 Mich at 562. The Tarnow court distinguished Allen v Kalamazoo Paraffine Co, 312 Mich 575 (1945), in which the plaintiff was injured on the job in 1943 while a stat-

ute was in effect which specified compensation of $18.00 per week for 100 weeks, but the parties had stipulated that the plaintiff lost the industrial use of the eye in September, 1944, at which time the statute provided compensation of $21.00 per week for 150 weeks. The court relied upon the unique facts of the case in holding that the operative date was when the loss of industrial use occurred and not the date of injury. In doing so, the Court rejected the employer's contention that the contractual employment relationship governed the substantive rights and obligations of the parties, 312 Mich at 576-577:

> Defendants offered to pay compensation for the lesser amount and urge on appeal that the right to compensation arises from the contractual relation between the employer and employee; and that the compensation act in force at the time the contractual relations were entered into gov-

erns the substantive rights and obligations of the parties.

> We are not in accord with this theory. Defendant company elected to accept the benefit of the act providing for workmen's compensation as well as such amendments to the act as the legislature might deem proper to make.

After the 1943 amendments made the workers' compensation system compulsory, the reliance upon contractual principles soon diminished. For example, in Crilly v Ballou, 353 Mich 303, 307-308 (1958), the court quoted from Cudahy Packing Co of Nebraska v Parramore, 263 US 418, 423 (1923), and said:

> Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital--the one for the sake of the wages and the other for the sake of the profits.

In Lahti v Fosterling, 357 Mich 578 (1959), the question was whether a 1955 amendment to the Act applied to a claim arising before the amendment went into effect. The amendment, if applicable, would have extended benefits beyond the period permitted under the terms of the statute in effect at the time of the injury. The employer cited Tarnow, supra, and other cases, arguing that the law in effect at the date of injury was absolutely controlling. The court used strong language in rejecting such an analysis, 357 Mich at 584-586:

> All of these cases are decided upon the theory that rights vested at the time of injury, and since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract.
>
> In dealing with the workmen's compensation act it is necessary occa-

sionally to bring ourselves back to the original aims and purposes of the act in order to better understand the rights of the parties involved. Naturally, in the construction of the act over a great many years, some unfortunate language has crept into opinions, which, by process of repetition, has become looked upon as the proper construction of the act.

The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law.

* * *

During the years, with the development of industry and the employment of larger and larger numbers of employees in the business world, the legislature has progressively, even if slowly, kept the act up-to-date by meeting the changing conditions and requiring industry to assume its share of the new responsibilities. The employers who were happy to be relieved of the old liabilities have sought by legalistic approach of narrow and limited construction of

the act to defeat its humanitarian purposes.

The court rejected the employer's contention that they had a vested right to enforcement of the terms of the statute as it had existed prior to its amendment, 357 Mich at 588-589:

> The question of determining what is a vested right has always been a source of much difficulty to all courts. The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.

In discussing a possible Contracts Clause challenge, Lahti quoted from Allen, supra, 312 Mich at 576-577, where the court rejected an employer's arguments based on a contract theory. 357

Mich at 593-594. The Lahti court also cited with approval (357 Mich at 592) and quoted from a New York case which upheld retroactive application of a workers' compensation act amendment despite a claim that it violated the Contracts Clause, Matter of Schmidt v Wolf Contracting Co, 269 App Div 201, 207; 55 NYS2d 162 (1945).

Although the opinion quoted, inter alia, from a West Virginia case which observed that employers' liability under workers' compensation statutes have some contractual basis, 357 Mich at 594, it is clear that the court rejected the employer's contention that the contract of employment conferred vested rights which could not thereafter be modified by statutory changes, 357 Mich at 595: "...

no vested or contractual right exists that prohibits the legislature from making a change in the remedy afforded employees ... ."

In Selk v Detroit Plastic Products, 419 Mich 1 (1984), on resubmission, 419 Mich 32 (1984), the court upheld, against a Contracts Clause challenge, a statutory amendment which increased the interest on workers' compensation awards made after January 1, 1982, and applied the amendment with respect to payments which became due prior to January 1, 1982. The court said that the higher interest rate may be awarded from the date payment was due even if that was prior to the effective date of the amendment, "without running afoul" of the Contracts Clause. 419 Mich at 11. The court first rejected the

theory that since the employment is based upon a contract, for the Legislature to change the remedies would be a violation of the contract, 419 Mich at 11:

> While this Court has characterized workers' compensation as a liability arising out of the contract of employment, we have nonetheless consistently emphasized that workers' compensation is a matter of statutory grace. (citations omitted, emphasis added).

The court then went on to quote from Lahti, supra, 357 Mich at 494-495, and other cases and concluded that despite the contractual nature of the relationship, the interest rate on a compensation award related only to an additional remedy for the enforcement of a contract. It did not alter the substance of the relationship, and therefore it could be modified without violating the impairment of contract clauses. 419 Mich at 12.

After making this ruling, however, the court went on to engage in the balancing test enunciated in Allied Structural Steel Co v Spannaus, 438 US 234 (1978), and Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400 (1983), in order to evaluate whether there was a "substantial alteration" of the terms of the contract and if so, whether the legislation is necessary to meet a "broad and pressing social need" and is "reasonably related" to that goal. 419 Mich at 13-14.

Petitioners quote a selected phrase from Selk, 419 Mich at 11 (Petitioners' Brief, p 14) and argue that under Michigan law the basis for employers' liability is contractual. While it is true that some cases like Lahti and Selk

contain reference to a contractual relationship arising out of the employment, the holdings of such cases explicitly recognize the pre-eminence of the Legislature's right to modify the statutes. To the extent that isolated language in Lahti and Selk demonstrated any confusion or overlap between the separate questions of whether the Contracts Clause applies to workers' compensation statutes, and whether such statutes violate the Clause, the confusion was dispelled in Franks v White Pine Copper Div, 422 Mich 636, 654 (1985). There, the court held that Michigan workers' compensation benefits "are social-welfare income-maintenance benefits" like unemployment compensation, social security old age, disability, and survivor's benefits, no-fault automobile benefits, aid to families with dependent

children, and general assistance. The court observed that all of these programs "are funded by impositions on employers and others of mandatory payments ... with statutorily prescribed benefits" and that in providing for such benefits, the Michigan Legislature "did not covenant not to amend the legislation." The court then unambiguously stated that Michigan workers' compensation benefits are not protected by the Contracts Clause, 422 Mich at 654:

> Income-maintenance benefits payable under a legislatively mandated social welfare program are not property protected by the Due Process Clause, the Contracts Clause, or the Takings Clause from substantive change by subsequent legislation irrespective of whether the recipient contributed to the cost of funding the benefit or of whether the program replaces a tort remedy which has been abolished. (footnotes omitted).

Finally, in the instant case, the Michigan Supreme Court again unequivo-

cally held that the level of workers' compensation benefits existing at the time of an injury is not a legitimate contractual expectation protected by the Contracts Clause. Romein, supra, 436 Mich at 533-534.

In summary, while there may occasionally have been some ambiguity or lack of analytical precision, one consistent principle can be identified in the Michigan cases: despite the fact of a contractual employment relationship, workers' compensation benefits are statutory in nature and do not involve contractual expectations protected by the Contracts Clause. The contract of employment is a necessary prerequisite since it establishes the existence of the relationship, but once that relationship is

established, the contractual aspects are eclipsed by the absolute statutory control over the rights of the parties.

II

THE MICHIGAN WORKERS' COMPENSATION STATUTE DOES NOT VIOLATE THE CONTRACTS CLAUSE.

Petitioners' Criticism Of Current Contracts Clause Jurisprudence Is Unwarranted.

Petitioners argue that Contracts Clause jurisprudence "in recent years" has "strayed from the original understanding of the clause" and they make an argument for "returning to the original understanding". Petitioners' Brief, pp 28-36. As justification for this approach, they assert that the language of the clause is "straightforward" and, relying on a begrudging interpretation of Home Building & Loan Ass'n v Blaisdell,

290 US 398 (1934), they assert that the Court's "current approach" is "out of harmony with the constitutional text, structure, history and purpose" of the clause. Petitioners' Brief, pp 30, 29. Respondent Attorney General submits that Petitioners' argument is misguided and fails to give sufficient consideration--indeed, fails to give any consideration--to the most fundamental principle which underlies Blaisdell: the recognition that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." Blaisdell, 290 US at 435.

In Blaisdell this Court upheld a Minnesota statute which permitted courts to postpone mortgage foreclosure sales of homes and to extend the period of redemption. Perhaps in an effort to avoid having to urge that Blaisdell be overruled, Petitioners have incorrectly characterized Blaisdell as "a narrow decision" based upon the temporary and emergency nature of the statutory provision at issue. While it is true that the case involved an emergency statute, Respondent Attorney General submits that the principles which were enforced in Blaisdell are more fundamental than Petitioners' arguments suggest. Petitioners' unduly narrow characterization of Blaisdell is best exemplified on page 29 of their brief when they assert that the decision rested on "the relation of emergency to constitutional power." That quotation improperly focuses on just one phrase taken out of context, but when one views this Court's statement in its entirety, it is

clear that the Court was engaging in a balancing of interests which included a consideration of "the power of the State" to enact necessary legislation, Blaisdell, 290 US at 425:

> In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

The remainder of the Blaisdell opinion clearly indicates that it was not a sudden break from the past. To the contrary, the Court engaged in an extended discussion of the history of judicial interpretation of the Clause,

290 US at 428: "To ascertain the scope of the constitutional provision we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." The Court cited numerous prior decisions establishing that the State retains control over remedial processes and went on to say, 290 US at 434-435:

> ... but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect."

Petitioners cite W.B. Worthen Co v Thomas, 292 US 426 (1934), which struck down a state statute which would have precluded collection of a previously-

adjudicated debt, and attempt to characterize it as demonstrating the narrowness of the Blaisdell decision. To the contrary, however, the Court in Thomas wholeheartedly accepted Blaisdell's recognition that the principle of state sovereignty can operate as a limitation against a literal interpretation of the language of the Contracts Clause, Thomas, 292 US at 432-433:

> We held in [Blaisdell] that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests of its people. The exercise of that reserved power has repeatedly been sustained by this Court as against a literalism in the construction of the contract clause which would make it destructive of the public interest by depriving the State of its prerogative of self-protection. We held that this reserved protective power extended not only to legislation to safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to

> legislative regulation, despite interference with existing contracts, -- an exercise of the State's necessary authority which has had frequent illustration -- but also to those extraordinary conditions in which a public disaster calls for temporary relief.

Petitioners make only a half-hearted argument that the language of the Contracts Clause should be applied literally. Indeed, they recognize that the Clause "is subject to judicial interpretation", that "not every legislative modification of workers' compensation benefit levels is an unconstitutional impairment of contract" and that "there is an unquestioned need for the states, in the exercise of their legitimate police power, to be able to regulate future conduct even if that may interfere with some contractual expectations." Petitioners' Brief, pp 30, 15, 36. By

thus recognizing that the literal language of the Clause is subject to some state limitations, Petitioners' argument regarding "original understanding" is shown to be merely dissatisfaction with the way this Court has interpreted it, not with the fact that it is subject to interpretation.

Respondent Attorney General submits that Petitioners' proposed interpretation of the Contracts Clause does not give sufficient recognition to the principle of state sovereignty and to the necessity that the strict terms of the Contracts Clause must be accommodated to the legitimate exercise of the state's police power. Respondent Attorney General submits that current Contracts Clause jurisprudence is faithful to the true meaning

of the Clause, when it is interpreted within the context of other necessary constitutional principles, including the fundamental principle of state sovereignty. There is no reason for this Court to abandon its Contracts Clause jurisprudence, as currently exemplified in cases such as Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400 (1983).

The 1987 Amendments To Michigan's Workers' Compensation Law Were Legitimate Exercises Of The State's Police Power And Do Not Violate The Contracts Clause.

It has long been recognized that the restraints of the Contracts Clause must be accommodated to the inherent police power of the state.

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exer-

cising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.
Manigault v Springs, 199 US 473, 480 (1905), as quoted in Allied Structural Steel Co v Spannaus, 438 US 234, 241 (1978).

Many decisions of this Court describe the appropriate analysis to be employed in evaluating Contracts Clause claims, including Energy Reserves Group, Inc v Kansas Power & Light Co, 459 US 400, 411-413 (1983):

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *** The severity of the impairment is said to increase the level of scrutiny to which the legislation will be sub-

> jected. *** Total destruction of contractual expectations is not necessary for a finding of substantial impairment. *** On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. *** In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. ***
>
> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, ... such as the remedying of a broad and general social or economic problem. *** Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. *** One legitimate state interest is the elimination of unforeseen windfall profits. *** The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.
>
> Once a legitimate public purpose has been identified the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legisla-

> tion's] adoption." *** Unless the state itself is a contracting party, ... "[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."
> (citations and footnotes omitted).

Respondent Michigan Attorney General submits that the Michigan Supreme Court properly applied this analysis in concluding that Petitioners' constitutional rights were not violated by the 1987 amendments to Michigan's Workers' Compensation Law.

1. There Has Been No Substantial Impairment Of A Contractual Relationship.

Initially, it is important to recall that the only effect of the 1987 statutory amendments was to restore injured workers to the benefit levels they had

been receiving prior to the 1981 statutes. The 1985 Michigan Supreme Court decision in Franks had interpreted the 1981 statutes to permit Petitioners to reduce the workers' compensation benefit levels, and the 1987 statutory amendments simply returned the parties to the status quo which had originally existed. Therefore, in this sense, the 1987 statutes simply "restricts a party to gains it reasonably expected from the contract". Energy Reserves, 459 US at 411.

The Michigan Supreme Court correctly observed that the statutes which are at issue simply involve benefit levels and do not implicate the fundamental underlying purpose of the workers' compensation statutes which structure the relationship between employers and employees. Romein,

436 Mich at 534. Under the Energy Reserves, test, 459 US at 411, it is appropriate to "consider whether the industry the complaining party has entered has been regulated in the past." It is beyond dispute that the area of workers' compensation is heavily regulated. The Michigan Supreme Court observed that the workers' compensation statutes regulate "a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation." Romein, 436 Mich at 535. Indeed, in Michigan, state statutes constitute the exclusive remedy. MCL 418.131; MSA 17.237(13). The Michigan Supreme Court correctly observed that Petitioners knew that their rights were subject to alteration and that they were on notice that the Michigan Legislature

might seek to prevent the coordination of benefits. Romein, 436 Mich at 535. It is disingenuous at best for Petitioners to assert in this Court that the 1987 statute upset employers' "settled expectations and justifiable reliance interests". As described in the Statement of Facts in this brief, and in the brief for Respondents Romein and Gonzalez, it would be more accurate to say that it was Petitioners' aggressive litigation tactics, culminating in the Michigan Supreme Court's 1985 decision in Franks, which upset the settled expectations and justifiable reliance interests of all of the entities which had been involved in the extensive negotiations which culminated in the package of bills enacted in 1980-1981.

2. The 1987 Amendments Have A Significant And Legitimate Public Purpose.

As described in Energy Reserves, 459 US 411-412, this requirement ensures that the state is exercising its police power for a legitimate public purpose rather than providing a benefit to special interests. The type of "special interest" is perhaps demonstrated in Allied Structural Steel Co v Spannaus, 438 US at 247-249, in which the court invalidated a Minnesota pension law which had "an extremely narrow focus." Indeed, the Minnesota statute may in fact have been directed at only one particular employer. See Allied Structural Steel Co, 438 US at 248, n. 20, and Energy Reserves, 459 US at 412, n. 13. The 1987 amendments to Michigan's workers' compensation statutes

were not aimed at any such narrow special interests. To the contrary, they had broad application to many thousands of employees whose workers' compensation benefits were unexpectedly reduced. As the Michigan Supreme Court noted below, Romein, 436 Mich at 535-536, the workers' compensation reform package of legislation in 1980-1981 provided that resources saved as a result of coordination of benefits were reallocated to increase benefit levels for injuries occurring after January 1, 1982. Another statute had provided state-funded supplements for workers injured in the years between 1965 and 1979. MCL 418.352; MSA 17.237(352). The unexpected 1985 decision in Franks upset the settled compromise which had resulted in the package of reform bills, since it had the effect of reducing the

workers' compensation benefits for some workers who had not received a corresponding increase in benefit levels. The Michigan Supreme Court therefore correctly concluded that there was a legitimate state interest in correcting this perceived inequity. 436 Mich at 515.

Despite the pejorative characterization of these injured workers and Petitioners' attempt to impute some improper motivation to them, it is clear that restoring the benefit levels of those workers to the pre-1982 "uncoordinated" amounts was simply a legitimate policy choice by the Michigan Legislature, a policy choice which had been in operation for many years before the 1981 legislative reforms. The unexpected 1985 Michigan Supreme Court decision in Franks

resulted, in effect, in a windfall to Petitioners since it permitted them to reduce workers' compensation benefits to some injured workers to levels far below those which both the employees and employers had initially expected. The 1987 amendments were a permissible exercise of the state's police power to eliminate such windfall gains for Petitioners and restore some workers, such as Respondents Romein and Gonzalez, to their earlier benefit levels.

3. The Means Used To Effectuate This Legitimate Public Purpose Are Reasonable.

In Energy Reserves, 459 US at 412-413, it was observed that in reviewing economic and social regulation courts properly defer to legislative judgment as to the necessity and reasonableness of a

particular measure. In the instant case the Michigan Supreme Court correctly concluded that the statute "imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." Romein, 436 Mich at 536. Petitioners' arguments merely demonstrate disagreement with the determinations by the Michigan Legislature and Michigan Supreme Court. They have failed to demonstrate any basis for overcoming the deference which this Court must properly give to those judgments.

III

THE 1987 AMENDMENTS TO THE MICHIGAN WORKERS' COMPENSATION STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE.

The standards to be used in evaluating a due process challenge to retroac-

tive legislation have been clearly enunciated in several decisions of this Court, particularly in Usery v Turner Elkhorn Mining Co, 428 US 1 (1976) (upholding amendments to the Federal Coal Mine Health and Safety Act which imposed retroactive liability upon mine operators to provide compensation for disability incurred by former employees whose employment had terminated before the date of enactment) and Pension Benefit Guaranty Corp v Gray & Co, 467 US 717 (1984) (rejecting a challenge to the Multiemployer Pension Plan Amendments Act which required employers withdrawing from pension plans to pay a fixed debt to the plans and whose liability provisions took effect approximately five months before the statute was enacted). In Usery, supra, 428 US at 15-17, the Court said:

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *** And this court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. ***

*** But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *** This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. ***

It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively.

The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

In Pension Benefit Guaranty Corp, supra, 467 US at 728-730, the Court quoted with approval from Usery and went on to say:

> We further explained that the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. ***
>
> To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. *** But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

Petitioners' attempt to distinguish Turner Elkhorn by asserting that the legislation in question there only "attached

prospective consequences to past events by requiring compensation for future periods of disability" is simply wrong. Petitioners' Brief, p 47. This Court recognized in Usery that the legislation "has some retroactive effect" since it "requires compensation for disabilities bred during employment terminated before the date of enactment." 428 US at 15-16.

In Usery, this Court upheld "the imposition of liability for the effects of disabilities bred in the past" because such liability "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor--the operators and the coal consumers." Turner Elkhorn, 428 US at 18. That is precisely what the Michigan

Legislature has done in the instant case. The 1987 Michigan legislation restoring workers' compensation benefits is a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor--employers such as Petitioners General Motors and Ford.

Petitioners' reliance on Railroad Retirement Board v Alton R Co, 295 US 330 (1935), is misplaced. In Alton this Court invalidated provisions of the Railroad Retirement Act of 1934 which required employers to finance pensions for former railroad employees who had been fully compensated while working for the railroads. Even assuming that Alton retains vitality ("despite the changes in judicial review of economic legislation that

have occurred in the ensuing years", Pension Benefit Guaranty Corp, supra, 467 US at 733; Turner Elkhorn, 428 US at 19), it is clearly distinguishable. Just as this Court said that Alton did not control in the context of black lung benefit provisions in Usery, so, too, in the instant case, the Michigan workers' compensation benefits are not intended to meet an employee's "generalized need for funds", but instead are "to satisfy a specific need created by the dangerous conditions under which the former employee labored--to allocate to the [employer] an actual, measurable cost of his business." Turner Elkhorn, 428 US at 19.

The Michigan Supreme Court properly applied the standard of review enunciated

in Turner Elkhorn and Pension Benefit Guaranty Corp and concluded that the retroactive portions of the Michigan statute "are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed. These amendments served a rational legislative purpose to alleviate this hardship." Romein, 436 Mich at 528-529.

Respondent Michigan Attorney General submits that when the unique circumstances of the instant case are viewed within their proper perspective, it simply can not be concluded that in the 1987 legislation restoring prior workers' com-

pensation benefit levels to some injured workers, the Michigan Legislature acted in an arbitrary and irrational way.

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Gay Secor Hardy
Solicitor General

Thomas L. Casey
Assistant Solicitor General
Counsel of Record
525 West Ottawa Street
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Counsel for Respondent
Michigan Attorney General

September 5, 1991

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In 1980-1981, the Michigan Legislature passed statutes increasing workers' compensation benefits for workers injured thereafter and permitting employers to offset other "employer financed" benefits against the workers' compensation benefits otherwise due and owing.

General Motors and Ford took the position that while these enactments did not increase the workers' compensation benefits payable to workers injured prior to 1982, the statutes did relieve the Companies of the preexisting obligation to pay such workers the full amount of workers' compensation as originally established (by permitting offsets for other "employer financed" benefits).

General Motors' and Ford's actions in this regard were immediately—and successfully—challenged administratively and in the lower state courts. Eventually, however, the Michigan Supreme Court—in an earlier case involving General Motors to which respondents in the instant case were not parties—upheld the legality of retroactive coordination on statutory interpretation grounds; in so doing the Michigan Court agreed with General Motors that the adversely affected workers had no valid Contract Clause or Due Process Clause claim.

The 1987 Michigan Legislature responded by enacting a second—remedial and curative—statute requiring all covered employers to honor their workers' compensation benefit obligations incurred prior to 1982 according to the original statutory terms.

The first question presented is

> whether the 1987 Michigan enactment violates the Constitution's Contract Clause.

The second question presented is

> whether the 1987 Michigan enactment violates the Due Process Clause.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
1. Background	1
2. The Genesis of the Instant Case	2
3. The 1981 Act	3
4. The General Motors/Ford Position	4
5. The Adverse Reaction to the GM/Ford Position	5
6. The *Chambers* Decision	6
7. The Reaction to the *Chambers* Decision; and the Decision Regarding Rehearing	7
8. Immediate Legislative Response and the 1987 Act	8
9. The Post-1987 Act Litigation	10
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. A Mandatory Government Economic Regulation Enacted Precisely to Deny Parties the Freedom to Negotiate Their Own Agreement on the Matter Covered by the Regulation—Such as the Michigan Workers' Compensation Act—Creates Statutory Obligations Not Contractual Obligations	13
II. If Petitioners Had a "Contractual Obligation" to Pay Workers' Compensation Benefits to Respondents, That Obligation Was Perfected on the Dates of Respondents' Injuries and Was Vindicated, Rather Than Impaired, by the Michigan Statute	30

TABLE OF CONTENTS—Continued

	Page
III. If Petitioners Had a "Contractual Obligation" to Pay Benefits to Respondents, and That Obligation Was Adversely Affected by the 1987 Michigan Statute, It Is Clear Under This Court's Decisions That There Was No Substantial Impairment of a Contractual Obligation in Violation of the Contract Clause	36
IV. The Court Should Reject the Invitation to Remake Its Contract Clause Jurisprudence to Conform to Petitioners' "Original Understanding" Version of the Clause	42
V. The 1987 Act Satisfies the Requirements of the Due Process Clause	50
CONCLUSION	50
APPENDIX A	1a
APPENDIX B	7a

TABLE OF AUTHORITIES

CASES

	Page
Adkins v. Children's Hosp., 261 U.S. 525 (1923)	49
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)	19, 38, 40, 43
Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548 (1914)	47
Baltimore & Ohio Railroad Co. v. United States, 261 U.S. 593 (1922)	20
Bear Lake and River Water Works and Irrigation Co. v. Garland, 164 U.S. 1 (1896)	25
Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (1986)	9
Beer Co. v. Massachusetts, 97 U.S. 25 (1877)	45, 46
Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843)	47
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	42
Chambers v. General Motors Corp., decided *sub nom.* Franks v. White Pine Copper, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.*, 424 Mich. 1202, 389 N.W.2d 685 (1985)	*passim*
Chambers v. General Motors Corp., 1982 WCABO 751, lv. den. Mich. Ct. App. No. 67973 (April 25, 1983)	5
Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1972)	34
Colonial Penn Insurance Co. v. Heckler, 721 F.2d 431 (C.R. 3, 1983)	39
Coombes v. Getz, 285 U.S. 434 (1932)	28
Cooper v. Wicomico County, 278 Md. 596, 366 A.2d 55 (Md. 1976)	31
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)	25
Crane v. Hahlo, 258 U.S. 142 (1921)	11
Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923)	13, 21
Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)	46
Dation v. Ford Motor Co., 314 Mich. 152, 22 N.W.2d 252 (1946)	1
Douglas v. County of Pike, 101 U.S. 667 (1880)	28
Edwards v. Kearzney, 96 U.S. 595 (1877)	28

TABLE OF AUTHORITIES—Continued

	Page
El Paso v. Simmons, 379 U.S. 497 (1965)	36, 47
Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983)	*passim*
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	13, 43
Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885)	26, 32, 34
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	46
Franks v. White Pine Copper Div., Copper Range Co., 122 Mich. App. 177, 332 N.W.2d 477 (1982)	5
Garrison v. New York, 21 Wall 196	18, 26
George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983)	23
Gooding v. Ott, 87 S.E. 862, 77 W. Va. 487 (1916)	23
Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952)	23
Harrington v. Department of Labor and Industry, 252 Mich. 87, 233 N.W. 361 (1930)	1
Harris v. National Truck Service, 56 Ala. App. 350, 321 So.2d 690 (1975)	31
Henry v. Ford Motor Co., 291 Mich. 535, 289 N.W. 244 (1939)	1
Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)	*passim*
Horton v. Fleming Co., 3 Kan. App.2d 121, 590 P.2d 594 (Kan. Ct. App. 1979), *app. denied*, 225 Kan. 844 (1979)	31
Indiana *ex rel.*, Anderson v. Brand, 303 U.S. 95 (1938)	22, 26
Juneac v. ITT Hancock, 181 Mich. App. 636, 450 N.W.2d 22 (1989), lv. den., 434 Mich. 901 (1990), rec. den., 437 Mich. 951 (1991)	4
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	42, 43
Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959)	*passim*
Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443 (W. Va. 1978)	22, 23, 24
Lochner v. New York, 198 U.S. 45 (1905)	49
Louisiana *ex rel.* Folsom v. New Orleans, 109 U.S. 285	19, 26

TABLE OF AUTHORITIES—Continued

	Page
Mackin v. Detroit-Timken Axle Co., 187 Mich. 8, 153 N.W. 49 (1915)	23
Manigault v. Springs, 199 U.S. 473 (1905)	49
McAvoy v. H. B. Sherman Co., 401 Mich. 419, 258 N.W.2d 414 (1977)	2
Mitchell v. United States Fidelity and Guaranty Co., 206 F. Supp. 489 (E.D. Tenn. 1962)	31
Moses v. MacFerlan, 2 Burr. 1005, 97 Eng. Rep. 676 (Ct. of King's Bench 1760)	19
Mowrey v. Motor Wheel Corp., 1961 WCABO 463	37
New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885)	49
New York Central R. Co. v. White, 243 U.S. 188 (1917)	13, 15, 24
Norton v. C. P. Blouin, Inc., 511 A.2d 1056 (Me. 1986)	23
Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 32 Ariz. 275, 257 P. 644 (1927)	23
Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827)	29
O'Quinn v. Walt Disney Productions, Inc., 177 Colo. 190, 493 P.2d 344 (Colo. 1972)	23
Pearsall v. Great N. R.R., 161 U.S. 646 (1895)	47
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)	13, 20, 50
Phelps v. Board of Education, 300 U.S. 319 (1937)	22
Phillips v. City of West Palm Beach, 70 So.2d 345 (Fla. 1953)	31
Rookledge v. Garwood, 340 Mich. 444, 65 N.W.2d 785 (1954)	2
Saterlee v. Matthewson, 27 U.S. (2d Pet.) 380 (1829)	47
Selk v. Detroit Plastic Products, 419 Mich. 1, 345 N.W.2d 184 (1984)	2
Spencer v. Clark Township, 142 Mich. App. 63, 368 N.W.2d 897 (1985)	2
State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922)	29
Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1865)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122 (1819)	47
Tarnow v. Railway Express Agency, 331 Mich. 558, 50 N.W.2d 318 (1951)	2, 31
The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871)	50
Thomas v. Continental Motors Corp., 315 Mich. 27, 23 N.W.2d 191 (1946)	31
Todd Shipyard Corp. v. Witthuhn, 595 F.2d 989 (C.A. 9, 1979)	39
United States Mortgage Co. v. Matthews, 293 U.S. 232 (1934)	40
United States ex rel. Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867)	*passim*
United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980)	14
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	*passim*
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	13, 50
Vasquez v. Hillary, 474 U.S. 254 (1986)	42, 43
Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1873)	28
W. B. Worthen v. Kavanaugh, 295 U.S. 56 (1833)	28
W. B. Worthen v. Thomas, 292 U.S. 426 (1934)	28
Webb's Fabulous Pharmacies, Inc. v. Beckswith, 449 U.S. 155 (1980)	22
Welch v. Henry, 305 U.S. 134 (1938)	14
West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848)	47, 49
Wood v. J. P. Stevens & Co., 297 N.C. 636, 256 S.E.2d 692 (N.C. 1979)	31

MISCELLANEOUS

Ames, The History of Assumpsit, 2 Harv. L. Rev. 53 (1888)	19
B. Wright, The Contract Clause of the Constitution (1938)	43
Bernstein, The Future of Private Pensions (1965)	33

TABLE OF AUTHORITIES—Continued

	Page
Blackstone, Commentaries, Vol. I	18
Corbin, The Law of Contracts (2d ed. 1963)	17, 19, 20, 29
Corbin, Quasi-Contractual Obligations, 21 Yale L. J. 533 (1912)	19
Detroit Free Press, October 19, 1985	8
Detroit Free Press, November 3, 1985	8
Detroit Free Press, November 29, 1985	8
Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512 (1944)	43
Keener, A Treatise on the Law of Quasi-Contracts (1983)	19
Kmiec & McGinnis, The Contract Clause: A Return to the Original Understanding, 14 Hast. Const. L. Q. 525 (1987)	44, 46
LABORegister, June 1987	10
McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Calif. L. Rev. 267 (1988)	44, 46
Merrill, Public Contracts, Private Contracts, and the Transformation of the Constitutional Order, 37 Case West. Res. L. Rev. 597 (1987)	44
Pound, The End of Law As Developed in Juristic Thought, 30 Harv. L. Rev. 201 (1916)	22
Records of the Federal Convention of 1787 (Farrand, ed., 1937)	44
Restatement (Second) of Contracts (1981)	17, 19
Schiller & Weiss, Pensions and Wages: A Test for Equalizing Differences (Nov. 1978)	33
Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Jurisprudence, 60 So. Cal. L. Rev. 1 (1986)	48
Story, Commentaries on the Constitution of the United States (1970 ed.)	29
Sunstein, Naked Preference and the Constitution, 84 Colum. L. Rev. (1984)	49, 50
Williston on Contracts (3d ed. 1957)	17, 19, 20, 29

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
P.A. 1912, 1st Ex. Sess., No. 10, Pt. I § 4; Pt. II, § 1; Pt. III, § 1	1
1943 PA 245	1
1969 PA 317	1
1948 PA 246	1
1980 PA 357, § 1	1, 3
1981 PA 203	*passim*
1987 PA 28	*passim*
MCL 418.111; MSA 17.237(111)	1
MCL 418.131; MSA 17.237(131)	1
MCL 418.201; MSA 17.237(201)	1
MCL 418.301; MSA 17.237(301)	1
MCL 478.351; MSA 17.237(351)	1, 3
MCL 418.352(8), (10); MSA 17.237(352)(8)(10)	1, 4
MCL 418.354; MSA 17.237(354)	*passim*
MCL 418.355; MSA 17.237(355)	1, 3
MCL 418.391; MSA 17.237(391)	1, 4
MCL 418.811; MSA 17.237(811)	1, 2
MCL 418.831; MSA 17.237(831)	1
MCL 418.835; MSA 17.237(835)	1

CONSTITUTION OF THE UNITED STATES	
Contracts Clause	*passim*
Due Process Clause	*passim*

BRIEF FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

COUNTERSTATEMENT OF THE CASE

1. Background

In 1912 Michigan enacted a workers' compensation law providing that workers suffering injuries "arising out of and in the course of their employment" shall receive, as their exclusive remedy against their employer and fellow employees, scheduled weekly compensation and medical benefits; the injured workers' rights in this regard were made enforceable through administrative proceedings. P.A. 1912, 1st Ex. Sess., No. 10, Pt. I § 4, Pt. II, § 1; Pt. III, § 1; now 1969 PA 317, as amended ("the Act"), §§ 131, 201 & 301, MCL 418.131, .201 & .301, MSA 17.237(131), (201) & (301). See generally, *Lahti* v. *Fosterling*, 357 Mich. 578, 585, 99 N.W.2d 490, 493 (1959).

Although initially elective, since 1943 the Act's coverage, and adherence to its provisions, have been compulsory. 1943 PA 245; *Dation v. Ford Motor Co.*, 314 Mich. 152, 161-162, 22 N.W.2d 252, 256 (1946); Act § 111, MCL 418.111, MSA 17.237(111). Employers and their employees are thus forbidden to vary the Act's terms. *Harrington v. Department of Labor and Industry*, 252 Mich. 87, 233 N.W. 361 (1930); *Henry v. Ford Motor Co.*, 291 Mich. 535, 540, 289 N.W. 244, 246 (1939). Indeed, employee claims can only be settled ("redeemed") with official agency approval and after hearing. Act § 835, MCL 418.835, MSA 17.237(835).

Precisely to preclude any reliance claims regarding "closed," "settled," "completed" or "fully satisfied" periods or transactions, the Act has long provided that, "Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." Act § 831, MCL 418.831, MSA 17.237(831).

As a general matter, however, the law in effect at the time of *injury* controls an employee's right to—and level of—workers' compensation benefits. *Tarnow v. Railway Express Agency*, 331 Mich. 558, 50 N.W.2d 318 (1951). The exception has been that the Michigan Legislature has from time to time *improved* benefits by retroactive remedial amendments.[1]

Prior to the events at issue here the Michigan Legislature had never reduced workers' compensation benefit rates by an amendment enacted subsequent to the injury, even prospectively. Prior to 1982, moreover, an employer's benefit obligations could not be reduced to take into account the injured worker's receipt of other employer-financed payments. Act § 811, MCL 418.811, MSA 17.237(811) ("[B]enefits derived from any other source than those paid or caused to be paid by the employer as provided in [the worker's compensation act, shall not] be considered in fixing the compensation under this act . . .").

2. The Genesis of the Instant Case

Against this background, Respondent Evert Romein, in the course of his employment with General Motors Corporation, suffered disabling pelvic and hip injuries in a fall on December 5, 1977. General Motors did not dispute its workers' compensation liability and, beginning in 1977, the Company commenced and continued statutorily required benefit payments to Mr. Romein. As of March 30, 1982 these payments were $99.00 per week.

[1] *Rookledge v. Garwood*, 340 Mich. 444, 65 N.W. 2d 785 (1954) (deleting requirement that employee elect between workers' compensation and third-party tort claim); *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W. 2d 490 (1959) (extending duration of medical benefit); *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414 (1977) (requiring employer's payment of 70 percent of benefits pending employer's appeal); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W. 2d 184 (1984); on resubmission, 419 Mich. 32, 348 N.W. 2d 652 (1984) (increasing interest rate on unpaid weekly benefits); *Spencer v. Clark Township*, 142 Mich. App. 63, 368 N.W. 2d 897 (1985) (extending coverage to volunteer ambulance drivers and attendants).

Respondent Arturo Gonzalez, in the course of his employment with Ford Motor Company from 1953 to 1980, contracted a disabling lung condition—silicosis—as a consequence of work-related foundry exposure. In September of 1981, Ford agreed, with agency approval, to pay—and Ford commenced payment of—workers' compensation benefits to Mr. Gonzalez in the amount of $176.00 per week.[2] (Joint Appendix, hereinafter "J. App.," 12).

As noted above, under the Michigan law applicable at the time, General Motors' and Ford's obligation to make workers' compensation benefit payments to Messrs. Romein and Gonzalez in the amounts just stated was not subject to reduction on account of the injured workers' receipt of other "employer-financed" benefit payments, such as the pension benefits to which both were entitled and which both began to receive following their injuries.

3. The 1981 Act

After Messrs. Romein and Gonzalez began receiving the workers' compensation benefits just stated, the Michigan Legislature enacted a package of amendments to the State's workers' compensation law. Insofar as relevant here, these amendments provided (1) a prospective improvement in the workers' compensation benefit rate for workers injured on or after January 1, 1982;[3] and (2) an employer right to reduce the amount paid in workers' compensation to take account of (to "coordinate") certain other "employer-financed" benefits.[4] The 1980-81 legislative package did *not* improve the workers' compensation benefits paid by employers to workers—such as

[2] Michigan's Silicosis, Dust Disease and Logging Industry Compensation Fund was obligated to reimburse Ford for all weekly benefits paid to Mr. Gonzalez in excess of an aggregate of $12,500.

[3] 1980 PA 357, § 1; MCL 418.351, MSA 17.237(351); MCL 418.355, MSA 17.237(355). (The "1980 Act.")

[4] 1981 PA 203, effective March 31, 1982; MCL 418.354, MSA 17.237(354). (The "1981 Act.")

Messrs. Romein and Gonzalez—injured before January 1, 1982.[5]

4. The General Motors/Ford Position

Nevertheless, General Motors and Ford, virtually alone among Michigan employers, contended that by reason of the 1981 Act, the workers' compensation benefits payable to workers who were injured prior to 1982—and who did not share in the 1981 Act's improvements in benefit rates —were as subject to deduction of "employer-financed" benefits ("coordination") as were the workers' compensation benefits of those who did share in those improvements.

In September 1983, approximately a year and one half after the effective date of the 1981 Act, General Motors *unilaterally* began *retroactive* "coordination" of Mr. Romein's workers' compensation benefits, based on his receipt of social security benefits and a pension. (J. App. 5) His workers' compensation benefits were reduced to *zero*. In August, 1982, Ford "coordinated" Mr. Gonzalez' pension benefits against his workers' compensation benefits, reducing his workers' compensation benefits to *zero*. These "coordinations" were part of an overall program

[5] Some employees injured prior to January 1, 1980 did receive a small *state-financed—as opposed to employer-financed*—supplement. MCL 418.352(8), (10); MSA 17.237(352)(8), (10); MCL 418.391; MSA 17.237(391). However, the supplemental benefit is not payable to persons such as Mr. Gonzalez, injured after 1979; and is, indeed, unavailable to the vast majority of all claimants. *Juneac v. ITT Hancock*, 181 Mich. App. 636, 450 N.W. 2d 22 (1989), lv. den. 434 Mich. 901 (1990), rec. den. 437 Mich. 951 (1991). At most, the supplement provides a fraction of the particular injured worker's compensation benefit as of January 1, 1982, without any subsequent adjustment. The state-paid supplement to Mr. Romein, for example, was $28 per week. (The assertions at pp. 3 and 26-27 of Petitioners' Brief and at n.6, p. 16 of the *amici curiae* brief of Citizens Insurance Company *et al.*, that the supplement was thus a "substantial" "cost-of-living" adjustment that "entitled[] eligible employees to receive *up to* the same weekly compensation as persons injured *after* January 1, 1982" (emphasis added), are thus belied by the facts.)

that affected all similarly situated General Motors and Ford workers.

5. The Adverse Reaction to the GM/Ford Position

The workers' compensation administrative agency, the lower courts, the Legislature and other employers disputed the GM/Ford position.

Thus, Mr. Romein filed a petition in November, 1983 with the Michigan Bureau of Workers' Compensation, objecting to the "coordination" of his workers' compensation benefits; in June, 1984, an administrative law judge ordered that the benefits be paid without "coordination." In October, 1984, an administrative law judge held that Ford had "improperly coordinated and reduced [the workers' compensation] benefits due and owing" Mr. Gonzalez and assessed a $1500 penalty against Ford. In other cases brought by similarly affected workers, the workers' compensation administrative agency consistently ruled against the employers. *See Chambers* v. *General Motors Corp.*, 1982 WCABO 751, lv. den. Mich. Ct. App. No. 67973 (April 25, 1983).

Likewise, the Michigan Court of Appeals ruled "that the Legislature intended the entire coordination-of-benefits reform to apply only to injuries incurred after the effective dates of those reforms." *Franks* v. *White Pine Copper Div., Copper Range Co.*, 122 Mich. App. 177, 185, 332 N.W.2d 447, 449 (1982).

Also, in early 1982, the Michigan Senate and House each adopted a resolution declaring that the coordination of benefits provided for by the 1981 Act did *not* apply to workers injured before March 31, 1982, the effective date of the coordination provisions.[6]

[6] The Legislature stated that 1981 PA 203 "was not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date. . . ." Senate Concurrent Resolution No. 575, adopted by the Senate on April 1, 1982 (1982 Senate Journal, p. 705), and adopted by the House of Representatives on May 18, 1982 (1982 House Journal, p. 1262).

Generally, other employers—including General Motors' and Ford's major competitor, Chrysler—did not "coordinate" the workers' compensation benefits of workers injured before March 31, 1982. As the Michigan Manufacturers Association later acknowledged in its *amicus curiae* brief below (at p. 3):

> It was well known that the applicability of section 354 [of the 1981 Act] to claimants injured before March 31, 1982, was controversial. Those employers and carriers who began, prior to this court's [1985] decision in *Chambers*, to coordinate worker's compensation benefits with other employer-funded wage-replacement sources did so at their peril, and in the knowledge that litigation over the statute's applicability was pending.

6. The *Chambers* Decision

Eventually, however, the Michigan Supreme Court concluded that, because the Michigan Legislature had not expressly stated otherwise, the 1981 Act should be construed to permit coordination of workers' compensation benefits regardless of the date of injury. *See Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W. 2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).[7]

In the *Chambers* litigation, the Michigan Court rejected the claimants' argument that to apply the 1981 coordination legislation to workers injured before its effective date would defeat their legitimate expectations and would violate their alleged vested rights under the Contracts and Due Process Clauses of the Constitution. In that case, General Motors—taking a position diametrically opposite to the one asserted here—contended that those clauses and principles were not applicable. See the

[7] The Michigan Court ruled in *Chambers* that since the 1982 resolutions passed by the Legislature (referred to in the text above) were not embodied in a statute signed by the Governor, those resolutions were not binding expressions of legislative intent. 422 Mich. at 659; 375 N.W.2d at 725.

Appendix A hereto, fully setting out the pertinent portion of General Motors' Brief in *Chambers*.[8]

The Michigan Supreme Court, agreeing with General Motors, held that "[w]orkers' compensation benefits are social-welfare income-maintenance benefits," which the Michigan Legislature is free to change at will. 422 Mich. at 654, 375 N.W.2d at 722. "In providing for such benefits, the Legislature did not covenant not to amend the legislation." 422 Mich. at 654, 375 N.W.2d at 723.

7. The Reaction to the *Chambers* Decision; and the Decision Regarding Rehearing

The *Chambers* decision generated immediate and strong reaction. Former Michigan Governor William Milliken, the sponsor of the 1981 Act (who is quoted approvingly at p. 3 of the Brief for Petitioners), disavowed the Michigan Supreme Court's conclusion:

> It was our purpose, as my remarks quoted in the opinion indicated, to apply the concept of coordination of benefits but only to those persons who would under the new legislation be receiving improved benefit rates against which any set-offs of other benefits might occur. *It was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments.*[9]

[8] The General Motors' *Chambers* brief—citing *Lahti v. Fosterling, supra; Selk v. Detroit Plastic Products, supra*, and other Michigan Supreme Court precedents—contended that "'no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law'" and that "'that which the legislature gives, it may take away. . . .'" Brief, p. 21.

[9] Letter to counsel dated October 25, 1985, later published to the Michigan Supreme Court and made part of the record below. (J. App. 32) (emphasis added).

Governor Milliken's Workmen's Compensation Director, a principal advocate of "coordination" who had represented the Governor before the Legislature, added:

> As director of the Bureau of Workers' Disability at the time, I was personally involved in the long and often intense negotia-

This and other expressions of surprise and dismay followed the *Chambers* decision, especially intensified by press reports that employers and insurance carriers who had *not* "coordinated" prior to the *Chambers* decision were seeking recoupment of benefits from an estimated 40,000 injured workers.[10]

Although the Michigan Supreme Court subsequently denied a motion to rehear *Chambers*, 424 Mich. 1202, 389 N.W.2d 685 (December 30, 1985), the author of the original opinion, Justice Boyle, dissented, noting the "harsh and unforeseen consequences" of the Court's decision, and stating, "The incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases." 424 Mich. at 1203, 389 N.W.2d at 685. (Three justices of the Court—thereby, with Justice Boyle, a majority—disclaimed having expressed an opinion on recoupment. 424 Mich. at 1202-03, 389 N.W.2d at 685.)

8. Immediate Legislative Response and the 1987 Act

Legislative response to the Michigan Supreme Court's *Chambers* decision and to its "harsh and unforeseen" consequences was swift.

On October 16, 1985—even before the decision denying the *Chambers* application for rehearing—House Bill No.

---

tions on these and other reform measures. I can assure you it was never the intent of the Milliken administration or, for that matter the Legislature to have the co-ordination-of-benefits provisions apply to those with an injury date prior to the effective date of the amendments. [J. App. 29]

Professor Theodore J. St. Antoine, who had headed Governor Milliken's study commission that had recommended "coordination," disavowed the implication in *Chambers* that he had contemplated or that he had endorsed retrospective application of that concept. (J. App. 34)

[10] "Lawmakers contest court interpretation of worker's comp," Detroit Free Press, November 3, 1985; "Firms cut checks for disabled workers," Detroit Free Press, November 29, 1985; "Ruling on work disability pay stands," Detroit Free Press, December 31, 1985.

5084, limiting coordination to "personal injuries occurring on or after March 31, 1982," was introduced. Within a few weeks, on January 29, 1986, the bill, as amended to require refunds with interest to claimants injured before March 31, 1982 whose benefits had been coordinated, passed the House by an 87-14 vote. (1986 House Journal No. 10, pp. 135-137, January 29, 1986; Appendix B hereto.)

On January 16, 1986, Senate Bill No. 625 was introduced, similarly restricting coordination to "personal injuries occurring on or after March 31, 1982." Efforts to obtain Senate passage continued until the Legislature enacted, and the Governor approved, 1987 PA 28, immediately effective May 14, 1987 (the "1987 Act").[11] The 1987 Act had bipartisan as well as business and labor support and passed 95 to 0 in the Michigan House and 35 to 1 in the Senate. The 1987 Act—after declaring that "it having been and being the legislative intention not to coordinate payments . . .resulting from liability . . . for personal injuries occurring before March 31, 1982"—expressly prohibited the coordination of workers' compensation benefits for such injuries and required refunds by employers and carriers of any coordination deductions that had been made. 1987 PA 28, § 354(17)-(20), MCL 418.354(17)-(20), MSA 237 (354(17)-(20)).[12]

---

[11] The "Versions of Bill Leading Up To 1987 PA 28, § 354," at J. App. 36-45, only covers the evolution of Senate Bill No. 67 in 1987. The House Substitute provisions (see, e.g., J. App. 40-41 and 44-45) were eventually adopted by a conference committee of the Senate and House (1987 S.J. No. 46, pp. 1231-2, May 4, 1987; 1987 H.J. No. 45, pp. 1231-2, May 14, 1987) and contain verbatim what had been adopted by the House a year earlier, on January 29, 1986, in HB No. 5084 (substitute), with the added statement of legislative intent in § 354(17).

[12] The 1987 Act as signed into law, also contained two crucial provisions sought by General Motors, Ford and other employers, to narrow the Act's definition of "disability" and to narrow the "intentional tort exception" to exclusivity under the Workers' Compensation Act, as declared by the Michigan Supreme Court in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W. 2d 882 (1986). (J. App. 53-56).

At the time of its passage, the then Director of the Bureau of Workers' Disability Compensation, Edward M. Welch, summarized the legislative purpose of the 1987 Act as being to "correct" the "situation" caused by the "surpris[ing]" *Chambers* decision.[13]

9. The Post-1987 Act Litigation

General Motors and Ford subsequently contested the constitutionality of the 1987 Act in this and other litigation.[14] In so doing, General Motors and Ford argued, first, that the 1987 Act violated the *State* Constitution's provisions concerning separation of powers in that the 1987 Legislature had improperly "overruled" the Michigan Supreme Court's 1985 *Chambers* decision; and second—and contrary to General Motors' own prior position in the *Chambers* case—that the 1987 Act impaired the Companies' vested rights, in purported violation of the United States Constitution's Due Process and Contract Clauses.[15]

When the Companies appealed to the Michigan Supreme Court, that court *unanimously* rejected their Contract

---

[13] Michigan Department of Labor "LABORegister," June, 1987, at 91.

[14] General Motors and Ford, together with the Michigan Mutual Insurance Company, sued Edward M. Welch, Director of the Bureau of Workers' Compensation, Frank J. Kelley, Attorney General, and John H. Chambers, appellee in the *Chambers* case, to challenge the constitutionality of the 1987 Act. Ingham Circuit Court No. 87-59051 CZ (Hon. Peter D. Houk). The trial court upheld the constitutionality of the Act and dismissed the suit. The plaintiffs subsequently appealed to the Michigan Court of Appeals, No. 104980, which has stayed proceedings pending decision in the instant case.

[15] After the Workers' Compensation Appeal Board, on May 20, 1987, reversed the decision of the administrative law judge and held for General Motors in the *Romein* case and the Appeal Board, on May 27, 1987, relying on the 1987 Act, affirmed the decision of the administrative law judge against Ford in the *Gonzalez* case, the Michigan Court of Appeals granted review and consolidated the cases. On May 16, 1988, the Court of Appeals reversed *Romein* and affirmed *Gonzalez*, upholding the constitutionality of the 1987 Act. 168 Mich. App. 444, 425 N.W. 2d 174 (1988).

Clause arguments. Justice Riley dissented solely on the *state law* claim that the 1987 Act violated separation-of-powers principles; and Justice Griffin, alone, dissented on the Companies' federal Due Process claim in an opinion relating that claim to the state, separation-of-powers ground and apparently only to the *post-Chambers* period.

SUMMARY OF ARGUMENT

Petitioners' main contention is that the Michigan workers' compensation statute creates "contractual obligations" protected by the Contract Clause. That contention is fatally flawed in four different respects:

I. The Contract Clause does *not* address the impairment of obligations of a *non-contractual nature*. And, "It has long been settled by decisions of this Court that the word 'contracts' in § 10 of article 1 of the Constitution is used in its usual or popular sense, by signifying an agreement of two or more minds, with sufficient consideration, to do or not do certain acts." *Crane v. Hahlo*, 258 U.S. 142, 146 (1921). The obligation claimed to be impaired here has none of the attributes of a contract; it is simply and only a substantive obligation mandated by an economic regulatory statute, and as such is not within the ambit of the Contract Clause. *Infra*, pp. 13-19.

II. If, *arguendo*, the workers' compensation statute here were somehow to be deemed to create "contractual obligations," petitioners' "contractual obligations" to respondents would have been fixed on the dates of respondents' injuries, which occurred prior to the enactment of the 1981 amendment on which petitioners rely; indeed, respondents had retired prior to the effective date of that amendment and had no contracts of employment with petitioners. The 1987 amendment, which petitioners challenge, did no more than reverse the impact of the 1981 amendment on respondents' benefits and *restore* to respondents their rights under the law that existed at the time their "contracts" were consummated. *Infra*, pp. 30-36.

III. In any event, aside from the points just outlined, the Contract Clause claim here must fail under this Court's established standard for determining whether an "impairment" has occurred within the meaning of the Clause. Given the history of workers' compensation legislation in Michigan, and the particular circumstances of the amendments here in question, petitioners could not have had a "reasonable expectation" that the Michigan Legislature had conclusively decided to permit coordination of benefits for workers injured prior to 1982. Moreover, the legitimate public purpose and the reasonableness of the 1987 amendment's restoration of benefits to the levels existing at the time of injury for those who had been injured prior to 1981 are readily apparent. *Infra*, pp. 36-42.

IV. Petitioners' call for a new Contract Clause jurisprudence based upon what petitioners' claim is the "original understanding" of the Framers cannot be justified. Petitioners' "original understanding" presentation is nothing more than a restatement of a position that has already been rejected after a searching examination by this Court and, thus, does not constitute the special showing required for a departure from *stare decisis*. Further, petitioners' own analysis cannot be squared with the "original understanding" they put forth. What is more, petitioners' invocation of an "original understanding" is both selective and self-serving. Petitioners omit materials that do not serve their cause, and fail to acknowledge the far-reaching implications of their position. *Infra*, pp. 42-50.

* * * * *

Petitioners' Due Process Clause claim is nothing but their Contract Clause claim rephrased. The due process standard for judging the constitutionality of retroactive statutory regulation is, moreover, less "searching" than the standard applied under the Contract Clause. And the 1987 amendment clearly satisfies the requirements of the Due Process Clause: *viz.*, that a retroactive application is justified by a rational legislative purpose. *Infra*, p. 50.

ARGUMENT

I. A Mandatory Government Economic Regulation Enacted Precisely to Deny Parties the Freedom to Negotiate Their Own Agreement on the Matter Covered by the Regulation—Such as the Michigan Workers' Compensation Act—Creates Statutory Obligations Not Contractual Obligations

Petitioners' main contention is that Michigan's workers' compensation statute creates "contractual obligations" protected by the Constitution's Contract Clause (Art. I, § 10, cl. 1). That contention flies in the face of the well-settled law in this Court. As *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) states: "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract." And as *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983), therefore reaffirms: "[A] workmen's compensation law may [constitutionally] be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917)." In the discussion that follows we show why these two propositions are—and should be—the law.

A. (1) Like the alchemists, petitioners have an urgent need: to transmute a base metal—a Due Process Clause challenge to an economic regulatory enactment—into a rare and more valuable substance (to a plaintiff)—a Contract Clause challenge to that legislation—and to do so through mystical incantations and prestidigitation. That need stems from the governing rule that "legislative Acts adjusting the burdens and benefits of economic life" violate the Due Process Clause only if "the legislature has acted in an arbitrary and irrational way," *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), while legislation altering contractual obligations is subject to a more "searching standard[]" of review, *Pension Benefit Guaranty Corp.*, 467 U.S. at 733.

Petitioners' difficulty in this regard is that the Contract Clause—"No State shall . . . pass any . . . Laws impairing the Obligation of Contracts . . . ." (Art. I, § 10, cl. 1)—plainly does *not* address the impairment of obligations of a *non-contractual nature*; impairment of "the obligation of contracts" is the touchstone of this limitation on the power of the States.

Given the Constitution's language and structure, state tax legislation, for example, is *not* subject to Contract Clause scrutiny but only to Due Process Clause scrutiny since "[t]axation is . . . [not] a liability which [the taxpayer] assumes by contract." *Welch v. Henry*, 305 U.S. 134, 146 (1938). Similarly, the federal legislative provisions for "railroad [retirement] benefits, like [the federal provisions for] social security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980).

Contractual relations, in other words, are not the totality of social relations, and contract law is not the totality of the law. The parties to any contract negotiate and reach a meeting of the minds against the background—and within the limits—set by judge-made mandatory rules such as those stated in the tort law and mandatory legislature-made rules such as those stated in the tax laws and in the laws regulating economic activity. Contracting thus takes place within the leeways left open by public law.

As we develop at length, the hallmarks of contract law—and of contractual obligation—are that the parties' rights and duties are created through a knowing and voluntary exchange of promises that the courts of law recognize as legally binding and that are enforceable through the procedures (and according to the remedies) those courts—and the legislatures—have devised over time to facilitate a system of free markets and free exchange.

That being so, legislation—such as the workers' compensation statute here—creating mandatory substantive

obligations that bind those who engage in a given economic activity regardless of their knowledge of, or their consent to, the legislation's terms, and making those obligations enforceable through an administrative scheme has *none* of the hallmarks of a contract and does *not* create any contractual obligation.

Contracts and mandatory regulatory enactments, then, are two *alternative, competing legal approaches* to the ordering of economic life and not a single featureless legal category. As this Court stated in *New York Central R. Co. v. White*, *supra*, 243 U.S. at 206, in rejecting a due process challenge to New York's mandatory workers' compensation statute, "we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable on that ground."

It would be paradoxical in the extreme if a law designed to "limit the freedom of employer and employee to agree respecting the terms of employment" were to be deemed to enlarge their contractual relationship by creating a contractual "term of employment."

(2) Stripped of its rhetoric, petitioners' contrary argument reduces to the following proposition: because the parties here had a contractual relationship covering terms and conditions of employment *other* than the matters covered by the workers' compensation statute, the obligations created by that statute must be treated as if those obligations, too, were contractual obligations. Petitioners would have it that because the contract *actually* reached by the parties is based in part upon the parties' assumptions as to the extent of the substantive obligations imposed by the statute, it is proper to "incorporate" the statutory obligations into the contract. Pet. Br. at 10-16.

To be sure, a prudent party enters into a contract only after assessing the possible effects that external events beyond his control—including changes in existing statutory

or case law—may have on the benefits and burdens to be expected from the bargain. And it is true that changes in the workers' compensation statute could affect an employer's overall employment costs and thus affect whether an agreement to pay certain wages or provide certain pension benefits turns out to be a wise bargain from the employer's point of view. But, by the same token, the wisdom of that bargain may be affected, for example, by changes in the tax laws or the environmental laws, by competitive changes in the market for the employer's product, or by political changes in the Persian Gulf.

Neither our system of contract—nor the Contract Clause—protects contracting parties from the consequences of such external changes of circumstances, unless those parties explicitly condition their promises, where legally permissible to do so, on the occurrence or nonoccurrence of those changes. To the contrary, both our system of contract and the Contract Clause contemplate that the contracting party who best predicts—or best provides for—possible external changes beyond his control will come out best. The law of contracts and the Contract Clause do not guarantee that there will be no such changes.

That being so, on the facts here, petitioners simply had no basis for relying on the assumption that the Michigan Legislature would not, and constitutionally could not, exercise its previously exercised authority to amend the workers' compensation statute in a way that would increase the costs of employers who had "coordinated" the benefits of workers injured prior to 1982.

B. The legal concept of "contract"—and the distinct social values embodied in a system for enforcing "contractual obligations"—have, of course, been central to our common law system. This rich historical tradition helps define the agreements protected by the Contract Clause and the purposes for which such agreements were singled out for special protection.

Williston defines "contract" as "*a promise, or set of promises*, for breach of which the law gives a remedy, or

the performance of which the law in some way recognizes as a duty." Williston on Contracts, § 1, at 1 (3d ed. 1957) (emphasis added). The Restatement adopts the Williston definition *in haec verba*, and adds that a "term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations." Restatement (Second) of Contracts §§ 1, 5 (1981). Corbin states that "contractual duty is imposed by reason of *promissory expression*." Corbin, *The Law of Contracts*, § 18, at 39 (2d ed. 1963) (emphasis added).[16]

It is equally to the point that "contract" and "contractual obligation" are defined not only by a process of inclusion but of exclusion as well. Thus, Williston distinguishes contractual rights and duties from those "rights and duties [which] are defined by law and imposed upon the parties *without any question of their knowledge of or assent to these specific terms*." Williston *supra*, § 32, at 90 (emphasis added). *See also* Restatement, *supra*, § 5 comment c. Centuries earlier, Blackstone drew the same distinction:

> [Municipal law] is also called a rule, to distinguish it from a compact or *agreement*; for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or "shalt not, do it." It is true there is an obligation which a compact carries with it; equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising any thing

---

[16] Promises giving rise to contractual obligations may be expressly stated by the contracting parties, or may be implied from the parties' conduct. In the latter circumstance an "implied-in-fact" contract is said to be created. "The distinction is not based on legal effect but on the way in which mutual assent is manifested." Williston, *supra*, § 3, at 8-9. *Accord* Restatement, *supra*, § 4; *Corbin, supra*, § 18, at 41.

at all. [Blackstone, Commentaries, Vol. I, at 45 (emphasis in original).]

C. Art. I, § 10 cl. 1 prohibits "State . . . Law[s] impairing the Obligation of Contracts." And,

> It has long been settled by decisions of this Court that the word "contracts" in § 10 of article 1 of the Constitution is used in its usual or popular sense, as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. "Mutual assent" [express or implied] "to its terms is of its very essence." *Louisiana ex rel. Folsom v. New Orleans*, 109 U.S. 285, 288; *Freeland v. Williams*, 131 U.S. 405, 414; *Essex Public Road Bd. v. Shinkle*, 140 U.S. 334, 340; *Morley v. Lake Shore & M. S. R. Co.* 146 U.S. 162, 169; *Garrison v. New York*, 21 Wall. 196, 203. [*Crane v. Hahlo*, 258 U.S. 142, 146 (1921) (brackets by Court).]

Of the cited cases the fullest and most informative discussion is that in *Garrison v. New York*. Justice Field, speaking for the Court, began by stating:

> It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is something called by text writers a contract of record, because it establishes a legal obligation to pay the amount recovered and, by fiction of law, where there is a legal obligation to pay, a promise to pay is implied. . . . But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement, express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. [88 U.S. at 203.][17]

[17] As *Garrison* makes plain, while "express" agreements and "implied in fact" agreements are equal and integral components of the contractual regime, "agreements implied in law" are *not* part of that regime at all.

To be sure, at English common law, for lack of an applicable common law writ, "quasi-contractual" obligations were enforceable in a "contract" form of action—*viz.*, by writ of assumpsit—rather than a "tort" action. Tort was found wanting because tort and quasi contract "obligations differ on one important particular; for while to avoid committing tort, one need only forbear, to discharge the obligation imposed by quasi-contract one must act." Keener, *A Treatise on the Law of Quasi-Contracts* 15 (1893) (footnote omitted). *Accord* Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, 63-64 (1888).

But, while the *remedy* for violation of a quasi-contractual obligation lay in assumpsit at English common law, there was no pretense that the *obligation itself* was "contractual" in nature. Thus, in the famous case of *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (Ct. of King's Bench 1760), Lord Mansfield held that an assumpsit action would lie to compel the defendant to return money unjustly obtained from the plaintiff even though it was concededly "impossible to presume any contract to refund the money." The justification for this result was: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it)." *Id.*

In sum, an "obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor." *Ames, supra*, 2 Harv. L. Rev. at 63. *Accord* Corbin, *Quasi-Contractual Obligations*, 21 Yale L. J. 533, 534 (1912); Williston, *supra*, § 3, at 10; Restatement, *supra*, § 4b.

[18] In other contexts as well, the Court has recognized that mutual assent is the essence of "contract." Thus, for example, the Court

The *Garrison* Court did not rest on this definitional approach alone but went on to add:

> *The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference.* If no assent be given to a transaction, no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition. [*Id.* (emphasis added). *Accord Louisiana ex rel. Folsom v. New Orleans, supra*, 109 U.S. at 288.]

The Court's more recent opinions are to the same effect. *See e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978) (Contract Clause protects obligations "voluntarily agreed to"); *id.* at 245-46 & n.18 (Contract Clause protects "bargained-for" expectations).[18]

The purpose of the Contract Clause is thus to protect the core purposes of contract law itself. Contract law is a corpus of legal rules designed to discover and give effect to the promises that the contracting parties have voluntarily made to each other. As Corbin aptly titles the opening section of his contracts treatise, "The Main Purpose of Contract Law is the Realization of Reasonable Expectations *Induced by Promises.*" Corbin, *supra*, *The Law of Contracts*, § 1, at 1 (emphasis added). *See also Williston*, *supra*, § 1, at 3.

The point of an exchange of promises supported by consideration is to induce a reasonable expectation that the promisor will act as he has stated he will act. It is for this reason that the law of contracts holds the promisor to his promise. And, it is for this reason that the particular subject of the Contract Clause is state enactments that frustrate the expectations created by the very nature of promissory expressions and of the law of contracts as generally understood.

In contrast, statutory law creating a substantive obligation is an act of sovereign will. As such there is nothing inherent in the act of passing a statute that carries with it an undertaking to maintain the statute as enacted. Indeed, in the nature of things a sovereign act negates any such assumption. As this Court has repeatedly emphasized, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Pension Benefit Guaranty Corp.*, *supra*, 467 U.S. at 729-730 (quoting *Turner Elkhorn Mining*, *supra*, 428 U.S. at 15-16) (citations omitted).

---

of Claims has by statute been given jurisdiction over various contract disputes. This Court has held that these jurisdictional grants extend to "an agreement 'implied in fact,' founded upon a meeting of the minds," but "not an agreement 'implied in law,' more aptly termed a constructive or quasi contract." *Baltimore & Ohio Railroad Co. v. United States*, 261 U.S. 593, 597-98 (1922).

The only relevant "undertaking" made by a state legislature in enacting mandatory regulations is one that is imposed by the Due Process Clause—*viz.*, that the legislature will make rational, non-arbitrary determinations as to whether to amend or repeal the regulations. *See supra*, p. 13.

This line of demarcation between the domain of contract and of contractual obligations, on the one hand, and the domain of mandatory substantive public law and of public law obligations, on the other, recognizes the ordinary, common understanding of what constitutes a contract and a contractual obligation and what does not. And as this Court has long recognized the term "obligation of contracts" is to have its ordinary meaning rather than some idiosyncratic meaning. See *supra*, pp. 18-19.

The sum of the matter is, as the Court stated in *Cudahy Packing Co. v. Parramore*, *supra*, 263 U.S. at 423-24, that

> *Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract;* that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital —the one for the sake of the wages and the other for the sake of the profits. . . . Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment. . . .[19]

---

[19] Several years earlier Roscoe Pound had presaged this understanding of the developing law:

> Even more significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. . . . These statutes have put jurists to

The Michigan Supreme Court is therefore entirely correct in its understanding that "Workers' compensation benefits are social-welfare income-maintenance benefits" akin to "unemployment compensation, social security, old age, disability, and survivors benefits, no-fault automobile benefits, aid to families with dependent children, and general assistance;" akin in other words to the prototypical "status" benefits. *Chambers*, 422 Mich. at 654, 375 N.W.2d at 723.[20]

---

much trouble when they have sought to find a place for them in the legal system. Some have said that modern labor legislation creates a *status* of being a laborer, and this has frightened more than one court. For *status* is felt to be an archaic legal institution which we have outgrown. . . . Others have said that the duties and liabilities involved in workmen's compensation were quasi-contractual, which means only that the author did not know what to call them or where to place them. What is clear is that they are not contractual and that they do not accord with the modern principles of the law of torts. [Pound, *The End of Law As Developed in Juristic Thought*, 30 Harv. L. Rev. 201, 219-20 (1916) (emphasis in original).]

[20] Of course, if a state court or legislature were for some reason to indulge the fiction that a mandatory substantive obligation created by statute is nonetheless to be characterized as an obligation of contract—or, *per contra*, to characterize an obligation created by a voluntary promissory agreement as a public law obligation—its characterization could not serve to expand (or contract) the scope of the Contract Clause. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckswith*, 449 U.S. 155, 164 (1980). To that extent, petitioners are right that the question we have discussed in text is a pure question of federal law. Pet. Br. n.3, pp. 10-11. (Where, unlike here, the question of the nature of the obligation is not so clear, the State's characterization of the obligation is entitled to weight. *Phelps v. Board of Education*, 300 U.S. 319, 322-23 (1937); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1937).)

But while this is a federal question in the sense just stated, we note that the overwhelming majority of state courts that have confronted the question here have concluded that mandatory workers' compensation statutes create statutory obligations not contractual obligations. *See, e.g., Lester v. State Workmen's Compensation Comm'r*, 242 S.E.2d 443, 452 (W. Va. 1978) (collecting cases). Indeed the deviant view petitioners espouse—*viz.*, that the rights and obligations created by workers' compensation statutes

E. In opposition to all this petitioners offer three counters: the decision in *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865), which petitioners cite for the prop-

---

are "contractual" in nature and origin—is an anachronism and is increasingly recognized as such by the state courts.

The view that workers compensation benefits are "contractual" can be traced to the early part of the 20th Century when a substantial majority of workers' compensation statutes were *elective* rather than *mandatory*. The permission to choose between the common law tort system and the statutory workers' compensation system was thought to impart the degree of voluntariness essential to "contractual" relations, and thus to make the choice of workers' compensation schemes a matter of free contracting. This was the rationale of the early Michigan cases, *see, e.g., Mackin v. Detroit-Timken Axle Co.*, 187 Mich. 8, 153 N.W. 49 (1915)—where the workers' compensation statute was elective until 1943—as well as in numerous other early decisions in jurisdictions with elective statutes.

Once workers' compensation statutes were amended to make coverage *mandatory*—and today there are only five elective states, 2A Larson, The Law of Workmen's Compensation, § 67-10 (1990 Supp.)—the retreat for the "contract" theory had been sounded. In West Virginia, for example, the decision in *Gooding v. Ott*, 87 S.E. 862, 77 W. Va. 487 (1916), embracing the "contract" approach was "expressly overruled" on this point in *Lester v. State Workmen's Compensation Comm'r, supra*, 242 S.E.2d at 450 n.13. The *Lester* court in a particularly thorough opinion termed the contract view of workers' compensation a "gross fiction" built on erroneous premises carried over from the early 20th Century case law. *Id.* at 447-50.

A long list of States have expressly abandoned their prior "contract" approach upon legislative action turning an elective into a mandatory system. *See, e.g., Ocean Accident & Guarantee Corp. v. Industrial Comm'n*, 32 Ariz. 275, 257 P. 644 (1927), *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952), *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986), *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495 (Iowa 1983), and *O'Quinn v. Walt Disney Productions, Inc.*, 177 Colo. 190, 493 P.2d 344 (Colo. 1972).

To be sure, at the time the fiction that workers compensation is "contractual" was adopted, that doctrine served the purpose of protecting fledgling workers' compensation statutes against *unsound* constitutional attack. The early cases adopting the "contract" approach were decided in the *Lochner* era when substantive due process was thought to pose an insurmountable barrier to economic and social legislation that restricted the ability of employers and

osition that "*quasi*-contractual" obligations are within the protective ambit of the Contract Clause; a line of cases holding the Contract Clause applicable to "implied" contracts; and a line of cases stating in a markedly different context that "the laws which subsist at the time and place of the making of a contract" are "incorporated in its terms." Pet. Br. at 10-16. None are remotely sufficient to the task.

1. Petitioners' reliance on *Joliffe* is misplaced. Contrary to their assertion, *Joliffe* was not a "Contract Clause decision[]." Pet. Br. at 11. Indeed, nowhere in the Court's opinion is the Contract Clause even mentioned. Rather, the central issue in *Joliffe* was whether an 1861 California statute regulating port pilotage was preempted by a federal statute covering the same subject matter. 69 U.S. at 459-63. And the portion of *Joliffe* to which petitioners would build a monument covered the following mundane, threshold question: whether a right to half fees for pilotage services offered and refused conferred by the 1861 statute was lost when, in the course of litigation by a pilot to enforce that right against a ship, the 1861 statute was repealed and replaced by an

---

employees to contract freely. Thus, to uphold the constitutionality of workers' compensation statutes, courts resorted to the fiction that the parties' choice between the tort system and the workers' compensation system was a matter of "free contracting," and upheld the constitutionality of the statutes on that basis. *See, Lester v. State Workmen's Compensation Comm'r, supra,* 242 S.E.2d at 447-48.

We think it fair to say that these early decisions reflect a well-warranted dissatification with the substantive due process doctrine rather than principled analysis of the nature of contract or the nature of workers' compensation statutes. As already stated in the text, this Court in *New York Central R. Co. v. White, supra,* set matters straight by making it clear that mandatory workers' compensation statutes are constitutional exercises of the States' broad police powers *even though the statutes limit the parties' "freedom of contract." See supra* p. 15. After the *White* decision—and with the adoption of mandatory workers' compensation statutes—the dominant trend in the state courts has been to recognize the conceptual inadequacies of the "contract" fiction.

1864 California statute *that did not disturb or otherwise impair the right to such fees.*

The Court, in concluding that the right continued, began by stating that the transaction in question—*viz.* the offer of services by the pilot and the refusal by the ship—"*cannot be strictly termed a contract*, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract;" the case therefore did not come within the rule that penalties imposed by statute do not survive the statute's repeal. 69 U.S. at 457-58 (emphasis added).

The Court then confronted the critical question of legislative intent straight on rather than through any general rule for ascertaining the legislature's presumed intent and found that "the Legislature did not intend by the repealing clause in the Act of 1864, to impair the right to fees" because the "new Act re-enacts substantially all the provisions of the original Act" and is " 'to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones.' " 69 U.S. at 458 (quoting *Wright v. Oakley*, 5 Met., 406.)[21]

Thus, *Joliffe* is at two removes from this case; *Joliffe* had nothing to do with the Contract Clause and nothing to do with any contractual transaction. To the extent that there is even the slightest implication in *Joliffe* that a "quasi-contractual" obligation is within the protective ambit of the Contract Clause—and we do not believe that there is—that implication can *not* be squared with the law of contracts as generally understood or with this Court's Contract Clause cases defining the terms "con-

---

[21] In view of this holding, *Joliffe* has recently been cited by the Court as in "[a]ccord" with the proposition that " '[n]otwithstanding . . . formal repeal [of an old act stating a certain obligation] it is . . . entirely correct to say that the new act [stating the same obligation] should be construed as a continuation of the old.' " *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 246 n.18 (1985) (quoting *Bear Lake and River Water Works and Irrigation Co. v. Garland,* 164 U.S. 1, 11-12 (1896)).

tract" and "contractual obligation" as used therein. *See supra*, pp. 16-20. It is significant in this regard that two of these *true* Contract Clause cases—*Garrison v. New York*, *supra*, and *Louisiana ex rel. Folsom v. New Orleans*, *supra*—*postdated Joliffe* and were written by *Joliffe's* author, Justice Field.[22]

2. According to petitioners this Court has applied Contract Clause analysis to "terms of employment implied from state statutes."[23] The cited cases, however, did *not* involve state enactments that regulate relationships between private parties. To the contrary, each involved a state statute setting out the terms of an *implied-in-fact* employment contract *between the State acting in its proprietary capacity as employer and state employees*. *See Fisk v. Jefferson Police Jury*, 116 U.S. at 132-34; *Mississippi ex rel. Robertson v. Miller*, 276 U.S. at 178-79; *Indiana ex rel. Anderson v. Brand*, 303 U.S. at 100.

---

[22] Petitioners' attempt to convert the statutory obligations created by the Michigan workers' compensation law into "contractual obligations" is in vain, moreover, *even if Joliffe* could be read for the proposition that the Contract Clause prohibits the impairment of quasi-contractual obligations as well as true contractual obligations. This is so because the obligations created by the Michigan workers' compensation statute are even further removed from true contractual obligations than are quasi-contractual obligations.

Quasi-contractual obligations share one attribute of true contractual obligations in that quasi-contractual obligations are enforceable in a common law breach of contract or "assumpsit" action. *See supra* n.17, pp. 18-19. The obligations created by the Michigan workers' compensation statute, in contrast, share *none* of the attributes of true contractual obligations, since these statutory obligations are enforceable *only* in administrative proceedings, the contours of which are specified by statute. *See supra* p. 1.

Nothing in *Joliffe* or any other decision of this Court remotely suggests that obligations that are *neither* created by the voluntary exchange of promises *nor* enforceable in a common law breach of contract action can be treated as "obligation[s] of contracts" within the meaning of the Contract Clause.

[23] *See* Pet. Br. at 12-13 & n.4 (citing *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885); *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 179 (1928); *Indiana ex rel. Anderson v. Brand*, *supra*).

The employment contracts at issue in these cases were no different in kind from those implied-in-fact employment contracts that arise with great frequency in the private sector when an employer publishes terms and conditions of employment and employees agree to those terms and conditions by beginning to work. Nor, for that matter, are the implied-in-fact employment contracts in this Court's precedents different in kind from the implied-in-fact contracts which arise when, for example, "A telephones to his grocer, 'send me a ten-pound bag of flour.' The grocer sends it. A has thereby promised to pay the grocer's current price therefor." Restatement, *supra*, § 4, Illustration 1.

As we have shown, implied-in-fact agreements are true contracts entitled to full protection under the Contract Clause. *See supra* n.16, p. 17. And where a State is one of the parties to such an implied-in-fact agreement the conclusion that a contract and contractual obligations governed by the Contract Clause result can be fairly derived from the general law of contracts. But it most emphatically does *not* follow that *mandatory government regulation of the employment relationship between a private employer and a private employee* creates a contract and contractual obligations governed by the Contract Clause.

3. Ultimately, petitioners fall back on the oft-cited principle, first stated by the Court in *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867), that "the laws which subsist at the time and place of the making of a contract" are "incorporated in its terms."

In *Von Hoffman* itself, however, it is expressly noted that this "incorporation" principle applies *only* to those laws "*which affect* [*the contract's*] *validity, construction, discharge, and enforcement.*" *Id.* (emphasis added). *Accord United States Trust Co. v. New Jersey*, 431 U.S. 1, 19-20, n.17 (1977) (*Von Hoffman* principle applies to laws "pertaining to the interpretation and enforcement" of contracts).

Von Hoffman is thus grounded on the notion that a "contract" does not exist—at least from a legal standpoint—unless the law recognizes the validity of the contract and provides means for its enforcement and, has been applied to cases in which state legislatures have repealed *preexisting statutory remedies* for breach of contract.[24] Such repeals have been held to "impair the obligation of contracts" because "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist. . . . The ideas of validity and remedy are inseparable . . . ." *Von Hoffman*, 71 U.S. at 552.[25]

Although the *Von Hoffman* line's *results* are unexceptionable, we would be derelict if we failed to emphasize the deficiency in its reasoning. As Corbin puts the point:

---

[24] A number of these cases are set forth in petitioners' brief. *See* Pet. Br. at 13 & n.4.

[25] This poi[illegible]at the heart of the cases in which the Court has invoked th[illegible] *Hoffman* principle to invalidate state legislation repealing [illegible]sting statutory remedies for breach of contract. *See, e.g., W.B. Worthen v. Kavanaugh*, 295 U.S. 56, 60 (1833); *W.B. Worthen v. Thomas*, 292 U.S. 426, 432 (1934); *Coombes v. Getz*, 285 U.S. 434, 442-44 (1932); *Douglas v. County of Pike*, 101 U.S. 667, 687 (1880); *Edwards v. Kearzney*, 96 U.S. 595, 600 (1877); *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314, 316-17 (1873).

One of these cases, *Coombes v. Getz*, relies in part on the Court's opinion in *Joliffe, supra*; and, thus, its *dicta* suggests a holding based on somewhat broader grounds. Upon analysis, however, *Coombes* falls squarely within the *Von Hoffman* line of cases. The plaintiff creditors in *Coombes* were the assignees of a sales contract with a corporation upon which a debt was owed. 285 U.S. at 439. The remedy available to the creditors to recover this contract debt was a cause of action against the directors of the corporation provided by state law. *Id.* When California repealed this cause of action during the course of the litigation the State effectively deprived the creditors of the essential means of enforcing their sales contract with the corporation, and thus "impaired" that sales contract within the meaning of *Von Hoffman* and its progeny. *Id.* at 442-44.

> Does the Constitution therefore deprive a State of legislative power to alter or repeal its *remedial* statutes for the enforcement of contracts? With respect to already existing contracts, the answer has been to some extent in the affirmative; and a reason often given is that such statutes are incorporated in and form a part of the contracts. *The reason as thus stated is bad; but the result reached may be sound and correct.* The legal relation of right and duty exists only by virtue of legal remedies for enforcement. A total destruction of remedy is a denial of "right." Thereafter "obligation," in any reasonable sense of the term, does not exist. [Corbin, *supra*, *The Law of Contracts*, § 551, at 199-200 (emphasis added)].[26]

Certainly, then, nothing in the *Van Hoffman* line of cases justifies a fiction that creates contractual obligations not out of voluntary promissory expressions but out of a mandatory public law.[27]

---

[26] *See also Ogden v. Saunders*, 25 U.S. (12 Wheat) 213, 316-18 (1827) (Trimble, J., concurring) ("[T]he obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of the contracts. . . . The obligation does not inhere, and subsist in the contract itself, proprio vigore, but in the law applicable to the contract."); Story, *Commentaries on the Constitution of the United States*, §§ 1372, 1378, at 243-44, 248-50 (1970 ed.) (same); Williston, *supra*, § 615, at 605.

[27] Petitioners' reliance on *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922), has no basis in that decision. The Court there simply quoted without comment or approbation a passage from an early New York decision suggesting that the New York workers' compensation statute "is read into and becomes a part of the [employment] contract." *Id.* at 271 (quoting *Doey v. Howland Co.*, 224 N.Y. 30, 36, 120 N.E. 53, 54 (1918)). This suggestion by the New York Court did not enter into this Court's decision, as reflected by the Court's holding that federal maritime law did not preempt application of the state workers' compensation statute to accidents occurring on a pier "whether [workers' compensation] awards under the act are made as upon implied agreements *or otherwise*." 259 U.S. at 276 (emphasis added).

Significantly, the New York decisions subsequent to *Doey v. Howland* have *rejected* the suggestion therein that workers' compensation is a matter of "contract." As the New York Court held

II. If Petitioners Had a "Contractual Obligation" to Pay Workers' Compensation Benefits to Respondents, That Obligation Was Perfected on the Dates of Respondents' Injuries and Was Vindicated, Rather than Impaired, by the 1987 Michigan Statute

Petitioners are insistent that their acknowledged obligation to pay workers' compensation benefits to respondents is not a statutory obligation but a contractual obligation. Indeed, that insistence is the necessary predicate for petitioners' claim that their "contractual obligation" to respondents was "impaired" by the 1987 Michigan statute in violation of the Contract Clause.

Nonetheless, petitioners neglect—undoubtedly through sheer inadvertence—to specify either the time at which this "contractal obligation" was assumed or its specific content. In this section of our Argument we indulge petitioners' legal theory that their workers' compensation obligations are "contractual obligations" and having done so we turn to the task of filling in these voids in petitioners' discussion of their theory.

As we demonstrate below, it is clear that if workers' compensation contracts existed between petitioners and respondents, petitoners' contractual obligations were fixed *on the dates of respondents' injuries* and were subject to the laws in effect *on those dates.* That being so, it is equally clear that when the 1987 Michigan Legislature enacted curative legislation compelling petitioners to pay workers' compensation benefits to respondents *in accordance with the laws in effect on the dates of respondents' injuries*, the Legislature in no way "impaired" petition-

---

in rejecting a Contract Clause challenge to a statutory amendment increasing workers' compensation benefits for workers injured both before and after the amendment: "Liability under the Workmen's Compensation Law does not arise out of contract. That liability has its origin not in contract but in legislative fiat decreed in accordance with constitutional mandate and hence does not violate the contract clause of the United States Constitution." *Schmidt v. Wolf Contracting Co.*, 55 N.Y. Supp. 2d 162, 169 (1945), *aff'd*, 295 N.Y. 748, 65 N.E.2d 568 (1946).

ers' contractual obligations to respondents. To the contrary, *the Legislature vindicated the "contracts" at issue* by holding petitioners to their "contractual obligations".

A. (1) When the "contract" theory of workers' compensation previously held sway in Michigan, *see supra* n.23, p. 23, the Michigan Supreme Court held that the

> "law which must control the [workers'] compensation to be paid is that which was in effect at the time the right to the compensation springs into existence." That right arose at the time of the injury . . . . [*Tarnow v. Railway Express Agency*, 331 Mich. 558, 563, 50 N.W.2d 318, 321 (1951) (quoting *Thomas v. Continental Motors Corp.*, 315 Mich. 27, 36, 23 N.W.2d 191, 194 (1946)).]

And, so far as our research shows, *every* jurisdiction that has at one time or another accepted the "contract" theory of workers' compensation has recognized this "time of injury" rule.[28]

(2) The judicial precedents holding that where there is a contractual obligation to pay statutory workers' compensation benefits the obligation becomes fixed at the time of injury are entirely consistent with the branch of the law of contracts covering aleatory promises—*viz.*, a promise the performance of which is by its own terms

---

[28] *See, e.g., Harris v. National Truck Service*, 56 Ala. App. 350, 354, 321 So.2d 690, 693-94 (1975) ("It is a controlling feature that workmen's compensation is of a contractual nature. Alabama has adopted the majority rule that the legislature is free to change the provisions of a compensation law up until the time of injury. However, because the employer and employee have implicitly contracted to abide by the compensation scheme in effect at the moment of injury, any attempt to amend the compensation schedule after the injurious accident can have no bearing on the award given . . ."); *Phillips v. City of West Palm Beach*, 70 So.2d 345, 346 (Fla. 1953); *Mitchell v. United States Fidelity and Guaranty Co.*, 206 F. Supp. 489, 590 (E.D. Tenn. 1962); *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 648-49, 256 S.E.2d 692, 700 (N.C. 1979); *Cooper v. Wicomico County*, 278 Md. 596, 600, 366 A.2d 55, 57 (Md. 1976); *Horton v. Fleming Co.*, 3 Kan. App.2d 121, 590 P.2d 594, 596 (Kan. Ct. App. 1979) app. denied 225 Kan. 844 (1979).

subject to the happening of an uncertain and fortuitous event, *Corbin*, *supra*, § 728, at 684—as commonly understood. This is confirmed by the passage from this Court's opinion in *Fisk v. Jefferson Police Jury*, *supra*, quoted at length in Pet. Br. at 12-13.

As discussed earlier, *Fisk* involved an implied-in-fact employment contract between a State in its proprietary capacity as employer and a public employee who had rendered services on behalf of the State. *See supra*, pp. 26-27. In holding that the State was barred by the Contract Clause from disclaiming its obligation to compensate the public employee for services *previously rendered*, the *Fisk* Court found that an implied-in-fact contract "to make compensation" is "*a completed contract* [*whose*] *obligation is perfect*" when the other contracting party has delivered property, paid money, rendered service, *or suffered loss at the request of or for the use of another.*" *Fisk*, 116 U.S. at 134 (emphasis added).

As *Fisk* makes clear, petitioners' "contractual obligation" to pay workers' compensation benefits to respondents was fixed and immutable at the time at which respondents "suffered loss at the request of or for the use of" petitioners; *viz.*, on the dates of respondents' injuries.

B. Although what we have said thus far is, we believe, dispositive of the matter, we would be remiss if we failed to note that our position is buttressed by the very argument offered by petitioners in support of their claim that the obligations created by workers' compensation statutes should be treated as if the statutes were "incorporated into" employment contracts.

According to petitioners, the "incorporation" principle makes sense in this context because it is commonplace for employers and employees to "bargain around" workers' compensation statutes in negotiating the terms of their employment contracts by, e.g., "bargain[ing] for enhanced disability benefits or . . . by decreasing pension or insurance benefits to take account of workers' compensation levels." Pet. Br. at 15.

On petitioners' theory, then, respondents here presumably suffered a diminution of benefits in other areas, such as wages, pensions, and insurance, to account for the fact that at all times prior to their injuries *their employers could not as a matter of Michigan law coordinate workers' compensation benefits.* By petitioners' hypothesis in other words, there was an "overall bargain" whereby respondents agreed to accept less in the way of "pension or insurance benefits" in return for higher workers' compensation benefits in the event that their employment was prematurely terminated by injury.[29]

If petitioners could reduce workers' compensation benefits after the date of injury *respondents* would, of course, *be denied* their part of this bargain.

C. Since petitioners so assiduously avoid any specifics on their "contractual obligation" to pay workers' compensation benefits to respondents, we can only hazard the following guess on how petitioners can say that the 1987 Michigan Act "impaired" that obligation: The 1987 statute prohibiting the coordination of benefits for workers injured prior to 1982 repealed the 1981 statute that, as interpreted by the Michigan Supreme Court, allowed such coordination. That being so, the 1981 statute allowing the coordination of benefits had been "incorporated into" the contracts of employment between petitioners and respond-

---

[29] The economic literature is to the effect that the pension benefits nominally "financed by the employer" (and asserted to be subject to coordination here) are in truth payments of deferred compensation previously earned by the employees, at the cost of less in the way of current compensation. *See* Bernstein, *The Future of Private Pensions*, 118-131 (1965); McGill, *Fulfilling Pension Expectations*, 164-165 (1962); Schiller and Weiss, *Pensions and Wages: A Test For Equalizing Differences* (Rev. November, 1978, funded by the U.S. Administration of Aging and the U.S. Department of Labor and University of Maryland's Computer Science Center). The latter paper states that, "More generous pension provisions are offset by lower wage rates, i.e., that equalizing differences operate across the different dimensions of total compensation." (Abstract).

ents and the 1987 repeal impaired the obligation of those contracts.

The obvious flaw in the foregoing is that when the 1981 statute was enacted the "contracts" between petitioners and respondents for the payment of workers' compensation benefits had, to use the words of *Fisk*, already become "completed contract[s]" whose "obligation is perfect". *Supra* p. 32. Thus the 1981 statute permitting coordination could only be incorporated in these contracts by impairing the perfected contractual obligation to pay "uncoordinated" benefits.

Equally to the point, since petitioners' argument is that workers' compensation is contractual on the theory that workers' compensation statutes are incorporated in the employer-employee contract of employment, petitioners have the following dilemma: by the time the 1981 Act became law *both Mr. Romein and Mr. Gonzalez had retired; neither was working for petitioners and neither had any employment contract with petitioners into which to incorporate the 1981 statute.* Indeed, since the "coordination" dispute relates to the retirement benefits of workers injured prior to 1982, by definition the entire affected class consists of retirees who had no employment contracts into which the 1981 Act could be incorporated. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-74 (1972).

Petitioners contract-impairment claim is thus at war with the very "incorporation" theory that is its foundation. What petitioners are arguing is that the workers' compensation statute in effect at the time of respondents' injuries, which did *not* allow for the coordination of benefits, was *displaced* as part of the parties' employment contracts by the 1981 statute allowing coordination.

But the "incorporation" principle by its terms provides that the law in effect *at the time of contracting* controls. If laws enacted *subsequent* to the formation of a contract somehow operate to displace the laws previously incorporated therein, then the "incorporation" principle is utterly incoherent even on its own terms.

Under such a line of reasoning each successive amendment to Michigan's workers' compensation laws would displace the laws previously incorporated in the affected parties' pre-existing employment contracts, *including* the 1987 statute prohibiting the coordination of benefits for workers injured prior to 1982. And under such a line of reasoning petitioners' contract-impairment claim must fail.

* * * * *

The crux of the matter is this: If any "impairment" of any "contractual obligation" occurred in the course of the events culminating in this litigation, that impairment was effected when the 1981 Michigan Legislature enacted amendments to the workers' compensation statute that, as interpreted by the Michigan Supreme Court, permitted employers to coordinate the workers' compensation benefits due to *workers injured prior to the 1981 amendment's effective date; workers whose pre-existing "contracts" for the payment of benefits did not allow for coordination.*

The amendment enacted by the 1987 Michigan Legislature to cure this impairment was *not* in itself an impairment of the "contractual obligations" petitioners had previously assumed at the time of respondents' injuries. Quite to the contrary, the 1987 Act did nothing more than require petitioners *to honor the "contracts" at issue according to their terms under the law as it stood at the time the contracts were negotiated and consummated and to disgorge the improper windfall petitioners had gained in the interim by dishonoring the contractual obligations they had undertaken to fulfill.*

Because petitioners could *not* reasonably have expected to be *relieved* of their contractual obligations by legislation postdating the consummation of their contracts, petitioners cannot in good conscience complain that legislation *restoring* those obligations amounted to a violation

of the Contract Clause. *El Paso v. Simmons*, 379 U.S. 497 (1965).

III. If Petitioners Had a "Contractual Obligation" to Pay Benefits to Respondents, and That Obligation Was Adversely Affected by the 1987 Michigan Statute, It Is Clear Under This Court's Decisions That There Was No Substantial Impairment of a Contractual Obligation in Violation of the Contract Clause

At this juncture—and disregarding our showing thus far—we assume that petitioners had a "contractual obligation" to pay workers' compensation benefits to respondents *and* that this obligation is measured by the 1981 Michigan statute as construed by the Michigan Supreme Court *and* that the 1987 Michigan statute increased this obligation. We show that, even assuming all this, petitioners' Contract Clause claim must fail under the well-established standard for testing such claims most recently outlined by a unanimous Court in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983).

A. (1) The first prong of the *Energy Reserves Group* test requires a determination of "whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship." 459 U.S. at 411 (emphasis added). If there has been no such *substantial impairment* then the Contract Clause inquiry is at an end and the remaining prongs of the test need not be considered. *Id.* at 421 (Powell, J. concurring) (joined by Chief Justice Burger and (then) Justice Rehnquist).

With regard to the substantiality of the alleged impairment in this case, two points are of particular significance. *First*, as Justice Powell emphasized in his concurring *Energy Reserves Group* opinion, there is "*no* substantial impairment of [a party's] contractual rights" where the party's "*reasonable* expectations have not been impaired by the [state regulation in question]." 459 U.S. at 421 (emphasis added). *Accord United States Trust Co., supra*, 431 U.S. at 19 n.17. *Second*, the question of whether a change in state regulation has defeated reasonable expectations depends in part on whether the parties entered into their contractual relationship at a time when such relationships were already subject to pervasive state regulation. *Energy Reserves Group*, 459 U.S. at 411.

(2) Given these two points, it is manifest that the 1987 Michigan statute did not work a "substantial impairment of [petitioners'] contractual rights."

As an initial matter, employers in Michigan have for decades conducted their business affairs with an understanding that the level of workers' compensation benefits to be paid to workers injured in their employ *is a matter within the sole discretion of the Legislature* and that the Legislature has from time to time altered benefit levels "retroactively" where that has been deemed necssary to achieve a just balance between the legitimate interests of employers and employees. Indeed, since all these alterations have improved benefits, the employers were on notice that it would be imprudent to conduct their affairs on the supposition that their workers' compensation costs would remain fixed. The Michigan workers' compensation law on its face, moreover, forecloses any reasonable expectation that the payment of workers' compensation benefits is a final transaction by providing that such a payment can *not* be deemed a "determination of the rights of the parties under this act." *See supra*, p. 2.[30]

Thus, in the leading Michigan case of *Lahti v. Fosterling, supra*, the Michigan Supreme Court upheld the application of a statutory amendment to the workers' compensation law, eliminating a durational limit on medical reimbursement benefits and applying that rule to injuries arising before the effective date of the amendment. The Michigan Court emphasized that "the subject matter of workmen's compensation reposes within the control of the legislature" and that the "humanitarian purpose[]" of workers' compensation legislation is to provide work-

---

[30] The "one year back rule" relied on at Pet. Br. 21, was inapplicable, even before the 1987 Act, under case law permitting a correction of benefit rates. *Mowrey v. Motor Wheel Corp.*, 1961 WCABO 463.

ers with just compensation for employment-related injuries. 357 Mich. at 592, 99 N.W.2d at 497. Accordingly, that Court found that the Michigan Legislature was at liberty to adjust workers' compensation benefits "retroactively" if in the judgment and discretion of the Legislature the purposes of the statute would be furthered thereby. 357 Mich. at 593, 99 N.W.2d at 499. *See also* the cases collected *supra* n.1, p. 2.[31]

In the particular circumstances of this case, moreover, any expectations petitioners may have had that the 1981 Act as construed in *Chambers* accomplished a complete and final accounting of their workers' compensation obligations to the respondents were even more unreasonable than the preceding Michigan authorities would suggest.[32]

Almost immediately after the 1981 Act was passed, both houses of the Michigan Legislature adopted a resolution stating that it had *not* been their intention "to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits

---

[31] The Michigan Supreme Court decision that prompted the Michigan Legislature to pass the 1987 statute challenged by the petitioners is itself but another instance in which the Michigan Court has upheld a "retroactive" adjustment of workers' compensation obligations previously incurred. In that case the Michigan Court stated: "Workers' compensation benefits are social-welfare income-maintenance benefits. . . . In providing for such benefits, the Legislature did not covenant not to amend the legislation." *Chambers*, 422 Mich. at 654, 375 N.W.2d at 722-23.

[32] In light of the nature of workers' compensation benefits and the pervasive regulation of that subject matter by the Michigan Legislature, petitioners' assertion that "[t]he substantial impairment of employers' contractual expectations in this case is closely analogous to that held unconstitutional in *Allied Steel*" (Pet. Br. at 19) cannot withstand a moment's scrutiny. *Cf. Allied Steel, supra*, 438 U.S. at 250 (Minnesota law increasing contractual obligations voluntarily undertaken by employer under negotiated pension plan is infirm under Contract Clause because, *inter alia*, "it did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State").

resulting from the injuries incurred prior to the act's effective date." *Supra* at p. 5. In the face of these resolutions, General Motors and Ford, virtually alone among Michigan employers, took a remarkably aggressive stance: General Motors and Ford *unilaterally* coordinated the benefits *already due and owing to injured workers*. General Motors' and Ford's actions were challenged immediately and, until the decision of the Michigan Supreme Court in *Chambers* which issued in late December 1985, were consistently found unlawful at both the administrative and judicial levels. *Supra* at pp. 5-6. The *Chambers* result itself was deemed "harsh and unforseen" by its author on a petition for rehearing. *Supra* at p. 8. And, not surprisingly, legislative initiatives to overturn *Chambers* followed immediately on the heels of that decision. *Supra* at pp. 8-10.

The foregoing makes it abundantly clear that at no point during the period from 1981 to 1987 did petitioners have a *reasonable basis* for the expectation that the Michigan Legislature—the body with final decisionmaking authority over the level of workers' compensation benefits to be paid to injured workers, *supra* at pp. 1-2—had conclusively decided to permit coordination of benefits for workers injured prior to 1982.[33] As the court below

---

[33] The same is true for *amici curiae* insurance carriers, who similarly profess reasonable reliance on an immutable state of affairs with respect to coordination. In the first place the *insurance contract* between the carriers and their policyholders was *not* the contract claimed below to have been impaired. There is, moreover, every reason to believe that the carriers set up reserves based on the liabilities created *at the times of injury* and *under the law applicable* when Messrs. Romain and Gonzalez and similarly situated workers became disabled. Third, the case law makes clear that insurance carriers and their policyholders cannot immunize themselves from later, otherwise valid legislation by locking themselves into contractual arrangements contrary to such legislation. *Todd Shipyard Corp. v. Witthuhn*, 596 F.2d 899 (C.A. 9, 1979); *Colonial Penn Insurance Co. v. Heckler*, 721 F.2d 431 (C.A. 3, 1983). Indeed, the insurance policy appended to the brief of the *amici curiae* (at p. 1a) indicates an agreement to pay for liabilities under subsequent statu-

stated: "[T]he employers were on notice of the legislative debate regarding the proposed changes in the law. Reliance on an area of the law that is in a state of flux is not reasonable reliance." Pet. App. 11a-12a.

B. The second and third prongs of the *Energy Reserves Group* test require that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation," and that the regulation must make an "adjustment of the 'rights and responsibilities of contracting parties [based] upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption.'" 459 U.S. at 411-12 (citing *United States Trust Co., supra*, 431 U.S. at 22; *Allied Structural Steel Co., supra*, 438 U.S. at 247, 249). These two requirements are easily met by the 1987 Michigan statute.

The obvious—and obviously sufficient—public purpose of the 1987 Michigan statute was to ensure that employees who had been injured prior to 1982 and who were receiving workers' compensation awards based on those injuries *would not suffer the unprecedented, "harsh and unforeseen" diminution in their benefits* that resulted from the *Chambers* decision.

But there is much more. On petitioners' own theory, there is every reason to believe that the workers who were injured prior to 1982 received *lower wages and benefits* during the course of their working years, and *lower pensions*, than they would otherwise have received if the law in effect on their injuries had allowed for the coordination of workers' compensation benefits. *Supra* at pp. 32-33. And, as the Michigan Supreme Court emphasized, "these employees were not entitled [to share in] the overall increase of [workers' compensation] benefits provided for those [employees] injured after 1982." Pet. App. 17a.

---

tory amendments. This Court has held that under such circumstances there is no impairment under the Contract Clause. *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934).

Thus, had the 1987 Michigan Legislature allowed the decision in *Chambers* to stand, these workers would have been "double-sufferers." Certainly, the effect of the 1987 statute is not, as petitioners would have it, to enable these workers to become "double-dippers." [34]

Most to the point, the foregoing is more than sufficient to show that it was well within the Michigan Legislature's legitimate prerogative to judge for itself the equities of the competing claims in this situation and to determine that the equities favored the workers who lost expected benefits and not the employers who gained a temporary windfall. *See Energy Reserves Group*, 459 U.S. at 412-13 ("Unless the State itself is a contracting party . . . 'as is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'") (quoting *United States Trust Co., supra*, 431 U.S. at 22-23).

Finally, there can be no question but that the means chosen by the Michigan Legislature to effectuate these purposes were reasonable. As discussed, the Legislature's principal purpose was to ensure that there would be no retroactive decrease in workers' compensation benefits for workers whose entitlement to those benefits had already arisen. To accomplish this end, the Legislature provided that all employers would be precluded in the future from coordinating benefits for workers who had been injured prior to 1982, *and* that those few employers (like petitioners) who had coordinated benefits in the meantime would be required to disgorge their windfall gains. As the Michigan Supreme Court held, the statute as thus drafted

---

[34] Indeed, if the Michigan Legislature had not required the *minority* of employers who had unilaterally repudiated their pre-1981 commitment to pay full ("uncoordinated") workers' compensation benefits to workers injured up to that time, one of two inequitable consequences would have come to pass: the minority would have *gained a cost advantage* over the majority who had met their pre-1981 commitments; or, to avoid that anticompetitive result, the majority would have had to be given a right of recoupment against workers injured prior to 1981.

"impose[d] no more retroactive liability than [was] necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." Pet. App. at 17a.

IV. The Court Should Reject the Invitation to Remake Its Contract Clause Jurisprudence to Conform to Petitioners' "Original Understanding" Version of the Clause

Petitioners entreat this Court "to restore" the Contract Clause to "its proper place in the constitutional structure." Pet. Br. at 28. Petitioners argue that this act of restoration can be accomplished simply by reading the prohibition on "impairing . . . the obligation of contracts" in a literal way. That language so read, petitioners say, calls for an "absolute" approach and forecloses "the kind of balancing test employed in the Court's modern decisions" beginning with *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and continuing through *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987). Pet. Br. at 30. Petitioners' call for a new Contract Clause jurisprudence is wholly unpersuasive.

A. There is, first of all, the small matter of a long line of contrary precedent. As the Court stated in *Vasquez v. Hillary*, 474 U.S. 254, 265-66 (1986): "While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" (Quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).) Petitioners have not even begun to make the special showing required for a departure from *stare decisis*.

The Court's decision in *Home Building & Loan Ass'n v. Blaisdell*, *supra*, has been on the books for over half a century. In that time, *Blaisdell* has become the centerpiece of this Court's Contract Clause jurisprudence *and has been repeatedly reaffirmed by this Court*. Within

the past fourteen years alone the Court has decided five Contract Clause cases that have accepted and applied the *Blaisdell* balancing test without dissent, and that have explicitly rejected the approach advocated by petitioners.[35]

Equally to the point, neither "experience" nor "facts newly ascertained," *Vasquez v. Hillery*, *supra*, 474 U.S. at 266, merit a reexamination of the foregoing line of decisions. This is *not* a situation in which experience has shown the Court's decisions unworkable or deleterious to the Republic. Nor is it a situation where newly-discovered historical evidence demands a restructuring of the constitutional landscape.

In this regard it is highly significant that the major works collecting and reviewing the historical materials relevant to understanding the Contract Clause were published decades before the recent decisions of this Court reaffirming *Blaisdell* and were thus before the Court for its mature consideration at the time of those decisions. *See, e.g.*, B. Wright, *The Contract Clause of the Constitution* (1938); Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 512 (1944).[36] And, the authors

---

[35] Most recently, the Court stated in *Keystone Bituminous Coal Ass'n*, *supra*, 480 U.S. at 503:

> [I]t is to be accepted as commonplace that the Contract Clause does not operate to obliterate the police power of the States. ("It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.") [quoting *Allied Structural Steel Co.*, *supra*, 438 U.S. at 241 and *Manigault v. Springs*, 199 U.S. 473, 480 (1905)].

See also United States Trust Co., *supra*, 431 U.S. at 22; *Allied Structural Steel Co.*, *supra*, 438 U.S. at 240; *Energy Reserves Group*, *supra*, 459 U.S. at 410; *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. at 190.

[36] In *Allied Structural Steel Co.*, *supra*, for example, both the majority and the dissent drew from these sources. *See* 438 U.S. at 240-41 nn. 10, 12; *id.* at 256-57 (Brennan, J., dissenting).

of the more recent articles put forward by the petitioners do not purport to have discovered any "new" evidence that proves petitioners' point beyond any doubt. Even those commentators are compelled to acknowledge that the history of the Contract Clause is sparse and largely unilluminating.[37]

---

[37] The one fact on which all agree is that the proposal to add the Contract Clause to the Constitution engendered minimal debate and discussion during the course of the constitutional convention and the ratification process. *See, e.g.*, McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 276-81 (1988) (cited in Pet. Br. at 32); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L. Q. 525, 532-34 (1987) (cited in Pet. Br. at 31); Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case West. Res. L. Rev. 597, 600 (1987) ("The origins of the Contract Clause are 'shrouded in mystery.'") (citation omitted).

What limited evidence there is of the Framers' "original understanding" is inconclusive at best. The commentators state that the birth of the Contract Clause can be traced to a proposal by Rufus King to add the following words of the Northwest Ordinance of 1787 to the Constitution: "no law ought ever to be made . . . that shall, *in any manner whatever*, interfere with or affect private contracts." 2 Records of the Federal Convention of 1787, at 439 (Ferrand, ed., 1937) (emphasis added).

After brief discussion about the potential breadth of such a clause and tentative approval of a modified proposal by the Convention, the Clause went to the Committee on Style, which reported back significantly redrafted language: "No state shall . . . pass . . . laws *altering or impairing* the obligation of contracts." 2 *Farrand*, at 596-97 (emphasis added). Two days later, the Clause was modified further to read, "No state shall . . . pass . . . laws impairing the obligation of contracts." *Id.* at 619 (emphasis added). The deliberations by the Committee on Style were not recorded. It is thus impossible to know for certain the motivation underlying the Committee's modifications to the language of the Northwest Ordinance.

But this much can safely be said: Considering the paucity of debate over the language that ultimately emerged from the Committee, the evolution of that language and the open-textured nature of the term "impairing," the fair inference is that the Framers did *not* intend the far-reaching incursion into the States' legislative authority that petitioners surmise.

Petitioners' "original understanding" presentation is thus nothing more than a restatement of a position that has already been subjected to a searching examination by the Court on many occasions and found wanting on each such occasion.

B. The logic of petitioners' argument for an absolute approach to the Contract Clause is no stronger.

(1) The proposition that the Contract Clause should be read literally to impose an absolute bar to the "impair[ment of] the obligation of contracts" has, to be sure, a beguiling air of simplicity and certainty to it; according to petitioners, all that one has to do is read the literal language of the Contract Clause and the results in cases arising under that Clause are immediately transparent. The reality of the situation, however, is far different.

This reality is driven home by petitioners' attempt to distinguish between state laws that are "purely retroactive"—and which, according to petitioners, are contrary to the Contract Clause *per se*—and state laws that "contain elements of both retroactivity and prospectivity," *viz.*, laws that are retroactive in the "secondary" or "weak" sense—and which, according to petitioners, are *not* necessarily contrary to the Contract Clause. Pet. Br. at 33-34. On the basis of this distinction we are told that *Blaisdell* and its progeny were wrongly decided but that *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877) and its progeny were correctly decided. *See* Pet. Br. at 34-36.

The purported distinction between these two sets of state laws altering contractual obligations can *not* possibly be discerned by parsing the literal language of the Contract Clause, which speaks in unitary terms of "impair[ments] [of] the obligation of contracts." Nor does this distinction follow from the Contract Clause's purpose to protect bargained-for expectations: For example, if a party enters into a long-term contract for the distribution of beer, and makes the necessary investments to honor that contract in reliance on the fact that the laws in effect at the time of contracting permit the distribution of beer, the party's

bargained-for expectations will be defeated no less, albeit constitutionally, if the State enacts a statute prohibiting the distribution of beer during the term of the contract. *Cf. Beer Co. v. Massachusetts, supra.*

In the final analysis, then, petitioners offer no basis for distinguishing among the various types of state laws altering or otherwise affecting "the obligation of contracts" *other than the need to balance the police power of the States against the reasonable expectations of contracting parties. See* Pet. Br. at 35-36. But this is the very balancing of interests that petitioners contend is, and should be, foreclosed by the Contract Clause's literal language. *Id.* at 34.

(2) Petitioners seek to create the impression that enshrining the Contract Clause's "original understanding" in this Court's jurisprudence is a minor adjustment whereby the word "impair[ment]" is read as saying that retroactive state legislation adding to, or subtracting from, a contractual obligation is absolutely prohibited. But, even assuming that petitioners' suggestion had merit on its own terms, it must be pointed out that petitioners' request to restore the "original understanding" of the Contracts Clause is, at best, selective and, beyond that, self-serving.

Thus, the very authorities on which petitioners rely have contended that the entirety of this Court's Contract Clause jurisprudence, beginning with *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) is built upon a foundation that is unfaithful to the Framer's "original understanding." [38]

[38] *See, e.g.*, Kmiec & McGinnis, *supra*, at 539 ("Chief Justice Marshall's attempt [in *Fletcher*] to subject all executed conveyances to scrutiny under the Contract Clause through the bald assertion that a 'grant is a contract executed' is theoretically problematic, and ultimately contrary to the original understanding of the Clause. . . . The Marshall Court also may have erred [in *Dartmouth College*] in expanding the definition of contract to include instruments, like a corporate charter, that reflect types of relationships between a state and its citizens fundamentally different from that represented by a contract."); McConnell, *supra*, at 290.

This Court's Contract Clause precedents have, moreover, recognized a number of distinctions that cannot be deduced from either the literal language of the Clause or the sparse evidence of the Framers' "original understanding." We have already alluded to one such distinction: that between retroactive and prospective laws. *See supra*, pp. 45-46. Other such distinctions include those between (a) legislation that *enlarges* the obligations of voluntary agreements and legislation that *diminishes* those obligations; [39] (b) legislation that rests on *inalienable* state powers (such as eminent domain and the police power) and legislation that rests on *alienable* powers the states *can* bind themselves not to exercise in the future (such as taxation); [40] (c) legislation that affects only *remedies* and legislation that affects *substantive rights*; [41] and (d) legislation that *technically* alters obligations and legislation that alters the *central* undertakings of the parties.[42]

If the Court were to adopt petitioners' "original understanding" version of the Contract Clause, most of the distinction recognized over the intervening 200 years will have to be reconsidered. Only the distinction between *remedies* and *substantive rights* is even arguably in the Clause's text; others have emerged in the ordinary process of reasoned elaboration as the Court has sought to accomodate the multiple purposes expressed in the Contract Clause and the Constitution as a whole.

Petitioners also leave out large parts of the legal understandings that formed the base for the Contract

[39] *See, e.g., Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380 (1829). 380 (1929).

[40] *See, e.g., West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (eminent domain); *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548 (1914) (police powers).

[41] *See, e.g., Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122 (1819); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

[42] *See, e.g., El Paso v. Simmons*, 379 U.S. 497 (1965); *Pearsall v. Great N. R.R.*, 161 U.S. 646 (1895).

Clause and for the Constitution as a whole. We note only the most glaring omission.

At the time the Constitution was adopted and for much of the 19th century, legal doctrine in general and constitutional law in particular recognized a basic distinction between two types of wealth now generally grouped together as "property." *Property* was conceived of as something that an individual produced with his own labor, through processes of hard work and competition open to all on equal terms. In contrast, *privilege* was understood as wealth that could be acquired only through the special aid of affirmative governmental assistance, for example, the privilege of incorporation. "The distinction between property and privilege was a widely shared, fundamental aspect of pre-twentieth century American thought that established the general context within which contract clause issues arose." Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 So. Cal. L. Rev. 1, 55 (1986).

Since "privileged" wealth was regarded as stemming from state assistance, that form of property was subject to much greater state regulations than was, *e.g.*, individually earned property. And since at the time of the Constitution's adoption, "corporations were clearly privileges," Siegel, *supra*, 60 So. Cal. L. Rev., at 67, the "original understanding" would suggest that corporate earnings are *not* the sort of interests entitled to protection from state regulation under the Contract Clause.

Thus, if the Court were to endeavor to recapture the "original understanding" of the Contract Clause, petitioners' asserted interests—the product of "privilege" and not a form of property—would likely be outside the Clause entirely.

(3) Finally, petitioners' criticism of *Blaisdell* as a departure from the "original understanding" of the Contract Clause, too, is lacking in historical perspective.

Since at least 1848, the Court has made clear that the Contract Clause does *not* limit the exercise of certain state powers, such as eminent domain, even if the State had contracted *expressly* not to use that power. *See, e.g., West River Bridge Co. v. Dix, supra.* Beginning in the late 19th century, the Court determined that the legitimate exercise of the state police power similarly is not "alienable" and similarly is beyond the Contract Clause's reach. *See, e.g., Manigault v. Springs, supra; New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 668-72 (1885).

In the era immediately preceding *Blaisdell*, however, the Court took an exceedingly narrow view of the legitimate purposes for which the police power could be invoked. Legislatures could not interfere in private economic life. To do so was viewed as "class legislation," rather than legislation for a legitimate public purpose. *See, e.g., Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45, 53 (1905).

Blaisdell's significance lies in its rejection of this narrow view of the police power. Consistent with the repudiation of *Lochner* in all its manifestations, *Blaisdell* recognizes that each State has the authority "to safeguard the vital interests of its people," including authority to protect against the economic hardships associated with a modern, highly integrated, industrialized economy. And since it had been established long before *Blaisdell* that the Contract Clause does not preclude legitimate state uses of the police power, *Blaisdell* broke little new ground in Contract Clause terms. As one scholar has said, in this sense "modern contract clause doctrine remains faithful to the original intent underlying the clause." Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1721 (1984).

Petitioners' challenge to *Blaisdell*, is in the final analysis, a challenge to *Blaisdell's* conception of the legitimate role of the police power. But in this respect, *Blaisdell* is only a small thread in the post-*Lochner* constitutional

cloth. In repudiating *Lochner*, this Court recognized that the police power can legitimately be used to promote social welfare through regulations of employment conditions and redistribution of resources. *See generally* Sunstein, *supra*, 84 Colum. L. Rev. at 1717-19.

Under *Blaisdell*, of course, States must still act for a legitimate public purpose, a requirement "guarantee[ing] that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group, supra*, 459 U.S. at 412. But when that requirement is met, it has been clear since at least the late 19th century that the Contract Clause does not preclude the kind of legislation at issue here. *See, The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 550 (1871).

Petitioners' call for overruling *Blaisdell* is, at base, a call for restoring the discredited jurisprudence of the *Lochner* era.

V. The 1987 Act Satisfies the Requirements of the Due Process Clause

Petitioners' Due Process Clause claim—that the 1987 Act's retroactive effect transgresses constitutional norms —is nothing but their Contract Clause claim rephrased.

In part III of our Argument, we have already discussed the controlling principles for judging the constitutionality of retroactive statutory regulation as stated in *Turner Elkhorn Mining Co., supra*, and *Pension Benefit Guaranty Corp., supra*, as those principles are applied under the Contract Clause's more searching standard of review.

So as not to burden the Court with a repetitive presentation, we rely on that discussion for the present purpose, and we further adopt by reference the full elaboration of the applicable Due Process Clause law in the *amicus curiae* brief of the State and Local Legal Center.

CONCLUSION

For the above stated reasons, the judgment below should be affirmed.

Respectfully submitted,

THEODORE SACHS
(Counsel of Record)
ANDREW A. NICKELHOFF
1000 Farmer Street
Detroit, MI 48226
(313) 965-3464

ROBERT M. WEINBERG
ANDREW D. ROTH
VIRGINIA A. SEITZ
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

APPENDICES

APPENDIX A

Point III of the Argument In the Brief For General Motors To The Michigan Supreme Court In *Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).

III.

Section 354 does not deprive any person of a vested or contractual right.

The Board also erred by concluding that application of § 354 would violate rules of statutory construction which prohibit retrospective application of statutes to take away or impair vested rights. App, pp 34a-36a. The Board's conclusion in that respect erroneously assumes that there exists a vested right to worker's compensation benefits. *Lahti* v *Fosterling*, 357 Mich 578 (1959), teaches otherwise.

In *Lahti* this Court was confronted with a claim by the plaintiff for additional medical benefits based upon an amendment to the Act which became effective after his injury. The statute in force on the date of plaintiff's injury required the employer to pay the expense of hospitalization and medical care for a maximum of four 6 month periods from the date of injury. Subsequent to the plaintiff's injury, the Act was amended to give the Bureau discretion to order unlimited additional 6 month periods of medical and hospital care to be paid by the employer. The employer contended that the right to compensation vested at the time the employee's cause of action accrued because the right to compensation arose out of an employment contract and that subsequent amendments could not modify the employee's rights or the employer's obligations.

However, this Court in *Lahti* rejected the defendant's argument and held that:

> "* * * no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law * * *." 357 Mich 578, 595.

The basis for this conclusion is that worker's compensation remedies exist as a matter of legislative grace and:

> "* * * that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." 357 Mich 578, 589.

Those principles, as enunciated in *Lahti*, were recently reaffirmed in *Selk*, *supra*. In *Selk*, as in *Lahti*, the employers argued that "'since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract'." 419 Mich 1, 11. As in *Lahti*, the court in *Selk* rejected that conclusion, citing *Lahti* and *McAvoy* v *H B. Sherman Co.*, 401 Mich 419 (1977):

> "'"* * * But we cannot say that such contractual relationship or liability necessarily precludes a subsequent Legislature from effecting changes in the Workmen's Compensation laws. Those who enter into such contractual relationships do so with knowledge of the right and power of the Legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change."'" *Lahti*, 357 Mich 578, 594-595, quoted in *Selk*, 419 Mich 1, 12.

* * * *

> "* * * 'remedies for the enforcement of a contract may be modified without violating the impairment of contract clauses'." *McAvoy*, 401 Mich 419, 457, quoted in Selk, 419 Mich 1, 12.

After discussing *Lahti* and *McAvoy*, this Court in *Selk* concluded:

> "* * * The state may, however, alter the terms of a private contract *to either lighten or increase obligations*, save where its activities constitute a substantial alteration of the terms of a contract. In the latter event, the alteration is permissible if the legislation is necessary to meet a broad and pressing social need and is reasonably related to that goal. *Allied Structural Steel Co* v *Spannaus*, 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978)." 419 Mich 1, 13. Emphasis added.

Here, the obligation of an employer remains to provide payments which equal the amount of workers' compensation awarded to the employee. What is changed is the sources from which the obligations may be met. See *Alessi*, *supra*, p 7, footnote. If the employee is receiving no pension or other employer-financed benefits, the entire obligation must be met out of worker's compensation funds provided by the employer through either self-insurance or commercial insurance. Insofar as other employer-financed benefits are available, they may be used to meet the obligation.

Should such employer-financed benefits cease, then the employer again must meet the full obligation from its own or its insurer's resources. By that means, the Legislature has insured that an injured employee always will receive that level of compensation which the Legislature has determined is necessary during the continuance of disability. Thus, if an employee's worker's compensation were coordinated because of receipt of social security benefits or a pension, he or she still would continue to receive at least the level of income the Legislature has de-

termined is appropriate. Should social security payments diminish or cease, the employer still would have to provide payments sufficient to meet the level of worker's compensation established by statute. The same would hold true if for some reason the assets of a pension plan became insufficient to meet pension obligations.

Moreover, even if there were a substantial alteration of plaintiff's right to receive a specified sum as the result of injury, which is not the case, *Selk* observes that such an alternation would be appropriate to remedy a serious social problem in the field of worker's compensation when the legislative solution is reasonably related to that problem. Like § 801, which was part of the reform package and the validity of which was recognized in *Selk*, § 354 also was part of the legislative solution to a perceived problem. The wisdom of that solution:

> "* * * is, in any event, a matter confined to the exclusive judgment of the Legislature. * * *" 419 Mich 1, 14.

Having determined that application of a 12% interest rate to payments accruing and relating to injuries occurring before the effective date of § 801 did not impair the obligation of contracts, this Court in *Selk* rejected the claim that to do so was violative of substantive due process:

> "Having found that the statute is reasonably related to a legitimate state interest for purposes of the impairment of contract claim, we conclude that defendants' due process claim is likewise without merit. In *Lahti* v *Fosterling*, *supra*, 357 Mich 591-592, we quoted from *Matter of Hogan* v *Lawlor & Cavanaugh Co.*, 286 App Div 600; 146 NYS2d 119 (1955), in holding:
>
> > "'"The due process clause of the State and Federal Constitutions does not freeze the burden of compensation liability as of the date of the occurrence of an industrial accident, beyond the

> > power of legislative change. In carrying out its social purpose, the Legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."'" 419 Mich 1, 14-15.

As the Court earlier noted in *Selk*, quoted *supra*, p 22, the State may by amendment either "lighten or increase" obligations and, as the language just quoted establishes, that may be done "even though the accident which gave rise to the disability or expenses had occurred prior to [enactment of the amendment]." Under § 354, the employer's obligation was unchanged, only the method of fulfilling it having been modified, but even if it were otherwise, *Selk* establishes that the result would be permissible.

A similar situation was presented in *In re: Certified Questions, Karl* v *Bryant Air Conditioning*, 416 Mich 558 (1982), in which the application of the comparative negligence statute to a plaintiff whose cause of action had accrued and whose case was pending prior to enactment of the statute "reduced plaintiff's damages by the corresponding amount that plaintiff was negligent, which was 95% of the total." 416 Mich 558, 562. The Court in *Karl* explained why this very significant alteration in the amount of plaintiff's recovery was not an impermissible result:

> "Comparison of 'rule three cases' [which involve 'vested' rights] to the instant case indicates that application of the products liability statute did not trigger the proscription found in rule three. First, the statute did not interfere with plaintiff's 'contractual cause of action' since an implied warranty action for personal injuries caused by a defective product is different from an express contract. Sec-

ond, this rule is also triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act. While the total damages which plaintiff could have received were significantly reduced by § 2949, plaintiff's cause of action was not legally barred or taken away.

"Section 2949 does not bar any claim, legal or equitable, but it states that 'damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.' See, also, *Li* v *Yellow Cab Co of California*, 13 Cal 3d 804, 828-829; 119 Cal Rptr 858, 875; 532 P2d 1226, 1243 (1975). Section 2949 is not a legal bar, but is a principle established by the Legislature which mitigates damages in products liability actions." 416 Mich 558, 577.

As in *Karl*, so here, plaintiff's right is not "barred or taken away"; instead, worker's compensation benefits paid directly to the worker may be diminished, but only for so long as and to the extent that other payments financed by the employer are received by the worker.

APPENDIX B

Text of Michigan HB 5084 (substitute) as approved January 29, 1986 (87-14) Adds § 354(17)-(19) and renumbers remaining subsection, as follows:

* * * *

(17) THIS SECTION APPLIES ONLY TO PAYMENTS RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 362, OR 835 FOR PERSONAL INJURIES OCCURRING ON OR AFTER MARCH 31, 1982. ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 352, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE NOT BEEN COORDINATED UNDER THIS SECTION AS OF THE EFFECTIVE DATE OF THIS SUBSECTION SHALL NOT BE COORDINATED, SHALL NOT BE CONSIDERED TO HAVE CREATED AN OVERPAYMENT OF COMPENSATION BENEFITS, AND SHALL NOT BE SUBJECT TO REIMBURSEMENT TO THE EMPLOYER OR CARRIER.

(18) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY PAYMENTS MADE TO AN EMPLOYEE RESULTING FROM LIABILITY PURSUANT TO SECTION 351, 361, OR 835 FOR A PERSONAL INJURY OCCURRING BEFORE MARCH 31, 1982 THAT HAVE BEEN COORDINATED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION SHALL BE CONSIDERED TO BE AN UNDERPAYMENT OF COMPENSATION BENEFITS AND THE AMOUNTS WITHHELD PURSUANT TO COORDINATION SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, TO THE EMPLOYEE BY THE EMPLOYER OR CARRIER.

(19) NOTWITHSTANDING ANY OTHER SECTION OF THIS ACT, ANY EMPLOYEE WHO HAS PAID AN EMPLOYER OR CARRIER MONEY ALLEGED

BY THE EMPLOYER OR CARRIER TO BE OWED THE EMPLOYER OR CARRIER BECAUSE THAT EMPLOYEE'S BENEFITS HAD NOT BEEN COORDINATED UNDER THIS SECTION AND WHOSE DATE OF PERSONAL INJURY WAS BEFORE MARCH 31, 1982 SHALL BE REIMBURSED WITH INTEREST, WITHIN 60 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, THAT MONEY BY THE EMPLOYER OR CARRIER, and renumber[s] the remaining subsection.

(18)

No. 90-1390

FILED

OCT 9 1991

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, PETITIONER

v.

EVERT ROMEIN, ET AL., RESPONDENTS

FORD MOTOR COMPANY, PETITIONER

v.

ARTURO GONZALEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

REPLY BRIEF FOR PETITIONERS

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

RODERICK D. GILLUM
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE CONTRACT CLAUSE	1
A. Workers' Compensation Benefits Are An Implied Term Of The Employment Contract	1
B. The Impairment In This Case Violated The Contract Clause	6
1. Petitioners' contractual obligations were not fixed on the date of respondents' injuries	6
2. The 1987 amendment cannot satisfy the prevailing Contract Clause standard	7
a. The substantiality of the impairment	7
b. The significance of the public purpose	9
c. The reasonableness of the means	11
3. The Contract Clause should be returned to its original understanding	11
II. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE DUE PROCESS CLAUSE	13
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 10
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 17
Bankers' Trust Co. v. *Russell*, 249 N.W. 27 (Mich. 1933) 18
Chambers v. *General Motors Corp.*, 375 N.W.2d 715 (Mich. 1985) ..... *passim*
Chicago & Alton R.R. v. *Tranbarger*, 238 U.S. 67 (1915) 13
Coombes v. *Getz*, 285 U.S. 434 (1932) 2, 3, 5
Cudahy Co. v. *Parramore*, 263 U.S. 418 (1923) 4
Energy Reserves Group v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 9
Ettor v. *City of Tacoma*, 228 U.S. 148 (1913) 13
Forbes Pioneer Boat Line v. *Board of Comm'rs*, 258 U.S. 338 (1922) 14
Franks v. *White Pine Copper Div.*, 375 N.W.2d 715 (Mich. 1985) 7, 8
Funkhouser v. *J.B. Preston Co.*, 290 U.S. 163 (1933) 16
Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931) 16, 18
Great Northern Ry. v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932) 5
Hale v. *Iowa State Bd.*, 302 U.S. 95 (1937) 6
Home Bldg. & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 12, 13
Howard v. *General Motors Corp.*, 399 N.W.2d 10 (Mich. 1986) 8
Indiana ex rel. Anderson v. *Brand*, 303 U.S. 95 (1938) 3, 4, 6
League v. *Texas*, 184 U.S. 156 (1902) 16
Lichter v. *United States*, 334 U.S. 742 (1948) 17
Lochner v. *New York*, 198 U.S. 45 (1905) 14
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 19
Mississippi ex rel. Robertson v. *Miller*, 276 U.S. 174 (1928) 4

TABLE OF AUTHORITIES—Continued

Page

Mowrey v. *Motor Wheel Corp.*, 1961 WCABO 463 8
Nacirema Operating Co. v. *Johnson*, 396 U.S. 212 (1969) 4
Paramino Lumber Co. v. *Marshall*, 309 U.S. 370 (1940) 15, 16, 18
PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 14
Phelps v. *Board of Education*, 300 U.S. 319 (1937) 6
Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935) 20
Saranac Land & Timber Co. v. *Comptroller*, 177 U.S. 318 (1900) 16
Shriver v. *Woodbine Savings Bank*, 285 U.S. 467 (1932) 3
Steamship Co. v. *Joliffe*, 69 U.S. (2 Wall.) 450 (1865) 2, 3
Steamship Co. v. *Portwardens*, 73 U.S. (6 Wall.) 31 (1868) 3
Sturges v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) 2
Swayne & Hoyt, Ltd. v. *United States*, 300 U.S. 297 (1937) 16, 18, 20
Treigle v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936) 3
Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) 13
United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989) 17
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 3
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 14, 15, 20
Van Emmerik v. *Janklow*, 454 U.S. 1131 (1982) 15, 16
Vytar Associates v. *City of Annapolis*, 483 A.2d 1263 (Md. 1984) 19
Washington Nat'l Arena Limited Partnership v. *Treasurer*, 410 A.2d 1060 (Md.), cert. denied, 449 U.S. 834 (1980) 14, 19

TABLE OF AUTHORITIES—Continued

	Page
Webster v. *Rotary Electric Steel Co.*, 33 N.W.2d 69 (Mich. 1948)	18
Wood v. *Lovett*, 313 U.S. 362 (1941)	3
STATUTES:	
Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*	15
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*	15
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*	15
Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262	17
§ 252(a)(2)	17
Mich. Comp. Law 418.111	4
Mich. Comp. Law 418.833	8
Mich. Comp. Law 418.833(1)	8
MISCELLANEOUS:	
III W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1768)	2
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960)	17
H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. (1984)	15
H.R. Rep. No. 151, 95th Cong., 2d Sess. (1978)	15
THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911)	
Volume 2	12
Volume 3	12
Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960)	17

REPLY BRIEF FOR PETITIONERS

I. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE CONTRACT CLAUSE

A. Workers' Compensation Benefits Are An Implied Term Of The Employment Contract

The nub of respondents' legal argument is that workers' compensation benefits are not part of the "contract" between petitioners and their employees and therefore are outside the scope of the Contract Clause. This is so, according to respondents, because workers' compensation obligations are not "voluntarily agreed to" and are not "'bargained-for' expectations" (Romein Br. 19). Respondents' position is inconsistent both with this Court's precedents and with the essential contractual predicate for workers' compensation.

The relationship between petitioners and their employees is indisputably contractual in nature. Some of the terms of the contract are negotiated, while others (such as workers' compensation) are imposed by law. In effect, the State of Michigan has said to employers: "If you wish to enter into a contract of employment, it must include at least the following provisions for compensation in case of injury."

Thus, the contracting parties voluntarily accept workers' compensation as part of their agreement, much like the minimum wage. If employers entered into a contract to pay employees the minimum wage, and the state thereafter retroactively increased (or decreased) the minimum wage rate for services already performed and paid for, the legislative action unquestionably would implicate the protections of the Contract Clause. This case is no different.[1] Contrary to respondents' assertion, the fact that the workers' compensation term of the contract is

[1] Although we drew this analogy in our opening brief (see Pet. Br. 15-16), respondents have offered no response.

imposed by law does not make it any less a part of the contract or remove it from the domain of the Contract Clause.

1. As respondents recognize (Romein Br. 18), the term "contract" is to be accorded its "meaning * * * in common use." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819) (Marshall, C.J.). Although respondents concede that the Contract Clause extends to implied terms in contracts, they are at great pains to attempt to draw a constitutional distinction between implied-in-fact and implied-in-law contracts. This distinction is utterly devoid of support in the language or history of the Contract Clause. On the contrary, Blackstone, who served as the principal legal authority for the Framers, included both implied-in-fact and implied-in-law contracts in the category of implied contracts. See III W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 153, 158, 161 (1768).

This Court's decisions also reject respondents' assertion that contract terms required by law are not within the Contract Clause because they do not constitute "rights and duties * * * created through a knowing and voluntary exchange of promises" (Romein Br. 14). In *Coombes v. Getz*, 285 U.S. 434, 442 (1932), for example, the Court held that the plaintiff stated a Contract Clause claim based on a contract term incorporated from a statutory provision by operation of law. The Court squarely rejected the dissent's position, echoed by respondents here, that the defendant's liability was "purely statutory" (*id.* at 449) and therefore did not come within the Contract Clause, which "is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact." *Id.* at 450.

Similarly, in *Steamship Co.* v. *Joliffe*, the Court held that a state statute gave rise to a "*quasi* contract" or "implied contract" (69 U.S. (2 Wall.) at 456-457) "which stands independent of the statute." *Id.* at 458. Despite the dissent's objection that there was "no ele-

ment of contract" and "no consent of minds" (*id.* at 468), the Court emphasized that "[i]n that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting." *Id.* at 457.[2]

Respondents' position also cannot be reconciled with the settled principle that the surrounding rules of law "'enter into and form a part of [the contract], as if they were expressly referred to or incorporated in its terms.'" *United States Trust Co.*, 431 U.S. at 19-20 n.17. Respondents give this principle an unreasonably narrow interpretation, contending that it applies "*only*" (Romein Br. 27) to those laws that bear on the validity and enforcement of the contract. They provide no basis to justify this artificial distinction, however, and it is refuted by the numerous cases cited in our opening brief (at 11-13 & n.4, 28 n.10) holding that the Contract Clause was violated by a statute modifying the substantive law that was implicitly incorporated in a contract.[3]

Finally, respondents misread the Court's analysis of implied statutory terms of employment contracts. See Pet. Br. 12-13. Nothing in those decisions even hints at respondents' purported dichotomy between implied-in-fact and implied-in-law contracts. Rather, they recognize without qualification that "a legislative enactment may

---

[2] Respondents are incorrect in asserting (Romein Br. 24) that *Joliffe* has no bearing on the Contract Clause. See 69 U.S. (2 Wall.) at 467-468 (Miller, J., dissenting). See also *Coombes*, 285 U.S. at 444; *Shriver* v. *Woodbine Savings Bank*, 285 U.S. 467, 477 (1932); *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 34 & n.* (1868).

[3] See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362 (1941) (repeal of statutory guarantee of title, as applied to prior purchases, violated Contract Clause); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (repeal of Teachers' Tenure Law, as applied to existing contracts, violated Contract Clause); *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936) (repeal of statutory right of stockholder to withdraw his investment in building and loan association, as applied to outstanding withdrawal application, violated Contract Clause).

contain provisions which, when accepted as the basis of action by individuals, become contracts" (*Anderson*, 303 U.S. at 100) and that the Contract Clause "extends to such [implied] contracts just as it does to those specifically expressed." *Robertson*, 276 U.S. at 179.

Indeed, if, as respondents acknowledge (Romein Br. 26), a contract of public employment may include an implied term based on a statute, there is no reason why a private employment contract may not contain the same implied term. This flaw in respondents' argument is well illustrated by the Michigan workers' compensation statute, which provides that "[e]very employer, *public and private*, * * * shall be subject to the provisions of this act and shall be bound thereby." MCL 418.111 (emphasis added). Respondents' approach would lead to the untenable result that public employees would have an implied contractual right to workers' compensation, while private employees would not.

2. Respondents' argument also founders on the fact that an employment contract existed between petitioners and respondents as an essential precondition for application of the workers' compensation system. As the State of Michigan concedes (Br. 20, 36), "[c]overage under a workers' compensation system is conditioned on the employment relationship which is contractual in nature * * *. The contract of employment is a necessary prerequisite since it establishes the existence of the [employment] relationship." Thus, "a workmen's compensation act combines elements of both tort and contract." *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 215-216 n.7 (1969).[4]

---

[4] *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 423 (1923), is irrelevant here. In upholding a workers' compensation order against a due process challenge, the Court in *Cudahy* emphasized the employee's "status" in order to establish "the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured." *Ibid.* Nothing in *Cudahy* forecloses the conclusion that workers' compensation is an implied term of the employment contract.

As our opening brief discussed (at 15), employment contracts incorporate the workers' compensation scheme in several ways. First, workers' compensation benefits are one element of the employees' total compensation and thus affect other contractual terms such as wages and insurance. Second, the parties often bargain for enhanced disability benefits beyond the minimum required by law. Finally, workers' compensation benefits are central to the modern employment relationship; there can be little doubt that both employers and employees assume that coverage in case of work-related injuries is part—indeed, an important part—of the employment agreement. Accordingly, whether or not the employment contract explicitly refers to the workers' compensation system, those benefits are accepted by both sides as an essential ingredient of the entire contract. See *Great Northern Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362 (1932) (parties "would be presumed to bargain with each other on the basis of existing law" (citing *Coombes*)).

Because workers' compensation benefits are inherently predicated on and necessarily subsumed in the parties' employment contract, they fundamentally differ from the "changes in the tax laws or the environmental laws" (Romein Br. 16) that respondents cite as instances of statutes that do not give rise to implied contractual terms under the Contract Clause. In contrast to workers' compensation statutes (see Pet. Br. 14), tax and environmental statutes are not embodied in the employment (or any other) contract; indeed, they do not even regulate the rights of the parties *inter se* but instead prescribe the relationship between private entities and the government or the public at large. For this reason, companies would be subject to the same tax and environmental obligations whether or not they have entered into contracts; that is not true for workers' compensation, which inextricably depends upon the existence of an employment contract and is central to the bargain.

Finally, the State cannot avoid the contractual element of workers' compensation benefits by arguing (Mich. Br.

15-19) for deference to the Michigan Supreme Court's ruling. Any deference in Contract Clause cases is limited to "question[s] * * * primarily of state law" (*Anderson*, 303 U.S. at 100) such as "the construction of the [state] statute" (*Phelps* v. *Board of Educ.*, 300 U.S. 319, 322 (1937)) or "the effect and meaning of the contract." *Hale* v. *Iowa State Bd.*, 302 U.S. 95, 101 (1937). There is no such dispute in this case; the sole question is one of federal constitutional law. Thus, the Michigan court's one-line statement that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause" (Pet. App. 14a) warrants no more deference than would a statement that a statute is "not a Bill of Attainder" or is "not an *ex post facto* law."

B. The Impairment In This Case Violated The Contract Clause

1. *Petitioners' contractual obligations were not fixed on the date of respondents' injuries*

Respondents begin their defense of the 1987 amendment with a state law argument—not adopted by the Michigan Supreme Court—that "petit[i]oners' contractual obligations were fixed *on the dates of respondents' injuries* and were subject to the laws in effect *on those dates.*" Romein Br. 30 (emphasis in original). Because respondents were injured prior to the 1981 coordination-of-benefits statute, they argue that that statute could not lawfully have reduced their workers' compensation benefits and therefore that the 1987 amendment was valid because it restored the pre-1981 benefit levels.

Respondents are simply wrong in suggesting that future benefit levels in Michigan are frozen forever at the level in effect at the moment of injury. The settled understanding of workers' compensation in Michigan is that benefits are subject to prospective modification by the legislature. This view of state law is confirmed by the decision of the Michigan Supreme Court in *Chambers* and *Franks*, which held that the 1981 statute coordinating benefits could be applied *prospectively* to reduce benefits for future disability periods but could not be applied *retroactively* to lower benefits for past periods. See Pet. Br. 4. This decision plainly contradicts respondents' assertion that employees' benefit levels are fixed on the date of injury and can never be thereafter reduced.

The weakness of respondents' position is further demonstrated by their need to invent an "exception" (Romein Br. 2) to their purported "general" rule in order to allow *increases* in future benefits. This "exception" is nothing more than respondents' *ipse dixit*. In terms of the agreement between the parties and the power of the legislature, there is no difference between prospective increases in benefit levels and prospective decreases; both are permissible under the theory of workers' compensation.

In sum, the contracts between petitioners and respondents contained a promise that, in the event respondents suffered a work-related injury, petitioners would make payments in an amount prescribed by the state workers' compensation law in effect for each subsequent period of disability. As reaffirmed in *Chambers* and *Franks*, the agreements thus contemplated that there might be a legislative modification—either upward or downward—in benefit levels for *future* (but not *past*) disability periods.

2. *The 1987 amendment cannot satisfy the prevailing Contract Clause standard*

Once it is recognized that the Contract Clause applies to purely retroactive modifications of workers' compensation obligations, it becomes obvious that the 1987 amendment cannot survive constitutional scrutiny. The only sort of Contract Clause analysis that the statute could possibly withstand is the one respondents put forward—a version that is so watered down as to read the Clause out of the Constitution.

a. *The substantiality of the impairment.* Neither respondents nor the State defend the Michigan Supreme Court's holding that the impairment here was insubstantial because petitioners retained the "basic benefit" of

tort immunity under the workers' compensation system. Instead, respondents assert that the impairment was not substantial because "employers in Michigan have for decades conducted their business affairs with an understanding that the * * * Legislature has from time to time altered benefit levels 'retroactively'" (Romein Br. 37). This argument is pure fiction.

To begin with, the Michigan Workers' Compensation Act expressly provides that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]"[5] (MCL 418.833(1)), thus giving employers an explicit assurance that past benefit periods will remain closed.[6] Moreover, this reading of the statute is confirmed by uniform past practice. This is the first time in the 75-year history of workers' compensation in Michigan (or in any other state) that the legislature has ever reopened *closed claims periods* to alter benefit levels. Indeed, the Michigan Supreme Court unanimously held in *Franks* that a modification in obligations for past disability periods would be impermissible. 375 N.W.2d at 730.[6]

---

[5] The Michigan Supreme Court has explained that MCL 418.833 is designed to "*limit* an employer's unexpected liability for compensation." *Howard* v. *General Motors Corp.*, 399 N.W.2d 10, 23 (1986). Respondents' only answer to this provision is their citation (Romein Br. 37 n.30) to a 1961 administrative ruling of dubious vitality (no Michigan court has ever cited it) that, on its own terms, allows compensation beyond the one year only when the higher amount "should have been paid from the beginning" (*Mowrey* v. *Motor Wheel Corp.*, 1961 WCABO 463)—such as, for example, when the employee's injury was greater than originally believed. That, of course, is dramatically different than an increase in benefit payments that conformed to the law in effect when they were made.

[6] Respondents cite a number of Michigan decisions as well as GM's brief in *Chambers* to support their claim that the legislature has previously interfered "retroactively" with the terms of workers' compensation benefits. See Romein Br. 2 n.1, 37-38; 1a-6a. But none of these rulings involved retroactivity in the sense that is relevant here. Rather, they all involved legislative changes in payments due for *future* disability periods—in other words, *prospective* changes in benefits—to employees who were injured prior to the legislative action. Thus, contrary to respondents' representations (Romein Br. 6, 10), GM's position in *Chambers* is fully consistent with its position in this case. Indeed, it is because petitioners understood and adhered to this fundamental distinction that they did not challenge the 1987 statute to the extent it eliminated coordination of benefits *in the future* for employees injured prior to 1982.

Respondents are wrong as well in arguing that the "particular circumstances" of this case precluded any reasonable expectation of finality. According to respondents, "at no point during the period from 1981 to 1987 did petitioners have a *reasonable basis* for the expectation that the Michigan Legislature * * * had conclusively decided to permit coordination of benefits for workers injured prior to 1982." Romein Br. 39. But what was the Michigan Supreme Court's unanimous decision in *Chambers* if not a conclusive determination that the 1981 statute plainly permitted coordination for employees injured before 1982? Petitioners' reasonable expectations, shaped on clear statutory language and an unambiguous decision from the State's highest court, surely were not negated by nonbinding legislative resolutions, letters from the ex-governor, or the fact that the legislature was debating a proposal to amend the statute to foreclose coordination in the future.[7]

b. *The significance of the public purpose.* A statute that works a substantial impairment of contract is unconstitutional if it does not serve a "significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at

---

[7] Respondents refer (Romein Br. 9) to House Bill No. 5084, as amended on January 29, 1986, in an effort to demonstrate that employers who chose to coordinate were on notice that retroactive liability might be imposed. Respondents fail to point out, however, that once the retroactivity provision was adopted as an amendment, the House *rejected* the amended bill. See 1986 House Journal No. 10, p. 138. The unamended version (without the retroactivity provision) was identical to Senate Bill No. 625, introduced on January 16, 1986. Far from alerting employers that retroactivity was on the way, this series of events served to confirm employers' expectation that the legislature would not take the unprecedented (and constitutionally dubious) step of imposing retroactive liability.

411. Respondents argue that this requirement is satisfied if there is some rational basis and public purpose for the Michigan legislature's decision retroactively to preclude coordination. See Romein Br. 40-41. The State goes even further, urging that the choice to disallow coordination need only be "a legitimate policy choice by the Michigan Legislature." Mich. Br. 54. But the Contract Clause demands far more than rationality and legitimacy of policy choices to sustain a substantial impairment of contract. See *Allied Steel*, 438 U.S. at 242 (state's justification must go beyond showing that the enactment is a valid "exercise of its otherwise legitimate police power").

Neither respondents nor the State has bothered to explain why the legislature's desire to allow employees injured prior to 1982 to receive non-coordinated benefits for *past* disability periods is constitutionally justified. By definition, the entire class of employees affected by the coordination provision continued to receive *full* compensation, through employer-funded pensions, social security, and other benefit programs, for their decreased ability to work. As the Senate analysis of the 1981 statute stated:

> [M]any employees now receive wage-loss benefits from two, three, or four different programs providing a total wage "replacement" greater than the wages the employee earned while on the job * * *. Coordination of benefits * * * would reduce the overlap between the various public and private wage replacement programs *while ensuring adequate wage-loss benefits to injured employees.*

Chambers, 375 N.W.2d at 723-724 (quoting legislative history) (emphasis added). *Nothing* in the debates preceding the 1987 amendment suggests that the class of employees injured prior to 1982 suddenly had become a group in dire need of economic assistance or, in CSG's revisionist view (Br. 23), were about to "fall[] into poverty." Indeed, it is worth reiterating that coordination of workers' compensation benefits to prevent double-dipping is the rule in many other states (see Pet. Br. 3-4 n.2) and governs *all* recipients of workers' compensation in Michigan injured after 1982.[8]

c. *The reasonableness of the means.* Respondents say virtually nothing to rebut our argument (Pet. Br. 25-27) about the poorness of the fit between the 1987 amendment and the purpose the Michigan Supreme Court attributed to the statute. Instead, they rely (Romein Br. 41; Mich. Br. 56) largely on the need to defer to the Michigan legislature's weighing of the equities. But deference is particularly inappropriate in the absence of some evidence that the legislature actually understood that it was impairing contractual obligations and nonetheless decided that the statute was a necessary, reasonably drawn measure. There is, of course, no such evidence here.

3. *The Contract Clause should be returned to its original understanding*

Respondents criticize our argument for a return to the original meaning of the Contract Clause on the ground that the historical evidence is "sparse and largely unilluminating" (Romein Br. 44). It is true that some issues have arisen in Contract Clause cases to which neither the text nor the history clearly speaks (*id.* at 47). On the issue of a purely retroactive law, however, the history is directly on point. See Pet. Br. 31-32, 35-36 n.14. Respondents' assertion that the distinction "between retroactive and prospective laws" is one that "cannot be deduced from either the literal language of the

---

[8] Respondents appeal for sympathy by emphasizing (Romein Br. 4) that coordination reduced workers' compensation benefits for the two individual employees to zero. To begin with, this assertion is not accurate. In addition to full pension benefits, respondent Romein continued to receive an additional weekly workers' compensation supplement. J.A. 7. But more important, the reduction in respondents' workers' compensation payments shows only that *other* employer-funded benefits payments, such as pensions or social security, were large enough to compensate them fully for lost wages. A worker who was injured prior to retirement is not entitled to a higher wage replacement than an employee who worked until retirement.

Clause or the sparse evidence of the Framers' 'original understanding'" (Romein Br. 47) suggests a complete unfamiliarity with the debates at the Constitutional Convention.

The issue of retroactivity was the turning point in the debate over the Contract Clause. When first proposed by Rufus King, the Clause generated serious opposition from influential delegates including Gouverneur Morris, George Mason, and Luther Martin, all of whom thought that the proposal "would be going too far" and that certain legislative interferences with contracts might prove to be "proper, & essential." 2 THE RECORDS OF THE FEDERAL CONVENTION, at 439 (Morris), 440 (Mason); 3 *id.* at 214-215 (Martin). Even Madison, a supporter, admitted that "inconveniences might arise from such a prohibition." 2 *id.* at 440. Defenders of the proposal did not respond that the Clause would be subject to exceptions, limitations, or balancing. Rather, James Wilson stated that "[t]he answer to these objections is that *retrospective* interferences only are to be prohibited." *Ibid.* (emphasis in original). Several changes in language were then made, with the explanation that the provision was "requisite" to "restrain the States from retrospective laws in civil cases." *Id.* at 449 (Dickinson). Once these changes were made, the delegates who had opposed the initial proposal made no further objection and the Clause was adopted. *Id.* at 619.

Thus, the virtually absolute nature of the provision, which elicited opposition, was cured not by softening the legal standard but by confining the domain of the Contract Clause to retroactive laws—laws attaching new and unforeseen legal consequences to already completed contractual arrangements. Because this case involves a purely retroactive law (see Pet. Br. 36), it is a paradigmatic violation of the Clause.

Respondents' plea for *stare decisis* (see Romein Br. 42-44) in an attempt to avoid our historical analysis is equally unavailing. The doctrine of *stare decisis* applies to the holdings of courts, not to their dicta. Our approach is consistent with the holding of *Blaisdell* (contrary to respondents' repeated misrepresentations, see Romein Br. 45, 49, 50) and would provide a better framework for reconciling the inconsistent decisions before and since.[9]

II. MICHIGAN'S RETROACTIVE INCREASE IN WORKERS' COMPENSATION BENEFITS VIOLATES THE DUE PROCESS CLAUSE

A. There is a fatal tension in the due process arguments presented by respondents and their *amici*. Their position rests entirely on the claim that any form of retroactive legislation will be upheld if it rationally advances a legitimate state goal. See Romein Br. 13, 21; Mich. Br. 57-63; U.S. Br. 9-12; CSG Br. 7. At the same time, however, the United States and CSG acknowledge that reliance and other equitable considerations are important factors in the due process analysis. See U.S. Br. 11-12; CSG Br. 23-30. As our opening brief explained (at 43), a test that looks to reliance necessarily takes into account more than just the rationality of the statute.

---

[9] Respondents assert (Romein Br. 48) that incorporation was a "privilege" under eighteenth-century law and that "corporate earnings" would therefore not have been protected under the original understanding of the Contract Clause. Respondents provide no evidence for this fanciful theory. It is true that the right to *incorporate* was classified as a privilege, but once an entity was incorporated, its property and its contracts were protected to the same extent as those of natural persons. See *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 691 (1819).

Respondents also contend (Romein Br. 48-50) that a change in this Court's understanding of the police power accounts for the post-*Blaisdell* change in doctrine. This confuses two lines of Contract Clause cases. Many Contract Clause cases—including those cited by respondents (at 49)—involved contracts in which the state agreed to give up some aspect of its taxing or regulatory authority. This Court gradually came to hold that the police powers of the state are not "alienable" and thus cannot be bargained away. See *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67, 76-77 (1915). This does not have any bearing on the prohibition against retroactive alterations in contracts between private parties, which was the central concern of the Framers.

Contrary to respondents' assertion, this Court repeatedly has struck down retroactive statutes that unquestionably were rational in respondents' sense of the term. See Pet. Br. 39, 43; *Ettor* v. *City of Tacoma*, 228 U.S. 148, 149-150, 156 (1913). Respondents and the United States do not even attempt to explain away any of these decisions. For its part, CSG tries to dismiss these holdings as "vestiges of a pre-Realist era." Br. 15. But the decisions plainly did not lose their vitality with the demise of *Lochner*; two were unanimous, and most were written, joined, or supported by Justices Holmes, Brandeis, Stone, or Cardozo—none of whom had an unduly expansive view of substantive due process.

If, as respondents contend, bare rationality were enough to support the constitutionality of purely retroactive legislation, state or local governments could, for example, force travelers to pay tolls for having traversed routes that had been toll-free at the time of the journeys; or they could raise tax rates governing long-settled periods; or they could retroactively *reduce* workers' compensation and force employees to pay refunds to their employers. These examples are not fanciful. The first two describe governmental actions that were invalidated under the Due Process Clause by this or other courts;[10] the third, of course, is identical in principle to this case. The problem posed here accordingly is not *whether* there are due process limits on retroactive legislation beyond a requirement of bare rationality; it is identifying the *nature* of those limits.

B. This Court's decisions have preserved legislative flexibility (the principal concern of the United States and CSG) by allowing governments to attach *prospective* consequences to past acts (see Pet. Br. 42)—although even in those circumstances the Court's assessment of constitutionality has "take[n] into account" reliance on

[10] See *Forbes*, 258 U.S. at 339-340 (invalidating retroactive toll); *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980) (invalidating retroactive tax increase reaching back eight years).

prior law, as the United States acknowledges. See U.S. Br. 11, quoting *Turner Elkhorn*, 428 U.S. at 17. The Court also has permitted limited periods of retroactivity to prevent evasion of pending legislation. The cases upon which the United States and Michigan principally rely —*Turner Elkhorn* and *R.A. Gray*—fall into these categories. See Pet. Br. 47 & n.18.

The Court has taken a different tack, however, when confronting purely retroactive legislation that reaches back beyond the term of the enacting legislature. In such cases, it has distinguished "between permissible curative legislation and unconstitutionally retroactive legislation." *Van Emmerik*, 454 U.S. at 1132 (White and Blackmun, JJ., dissenting from dismissal of appeal) (citing cases). See Pet. Br. 38-44. While the United States (Br. 22-23) and CSG (Br. 15-16) assert that this approach unduly limits legislative prerogatives, it is hard to believe that legislatures will often find it necessary to require that completed transactions be revisited as though different legal rules had applied in the past. In fact, the paucity of non-curative, purely retroactive statutes offered by respondents and their *amici* makes clear that the Court's approach does not interfere with the legitimate processes of government.[11]

[11] The handful of statutes cited by the United States (Br. 14-18) —none of which, in any event, was challenged before or upheld by this Court—supports our observation that legislatures need not disturb the status quo retroactively to achieve their legitimate ends; the government pointedly does not (and could not) suggest that these statutes were both noncurative and purely retroactive. The 1978 amendment to the Black Lung Benefits Act, which responded to the congressional finding that "many seemingly allowable claims" were being wrongfully denied (H.R. Rep. No. 151, 95th Cong., 2d Sess. 5 (1978)), was a curative law designed to ensure that persons actually received the benefits to which they *initially* had been entitled. See *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 378 (1940). The same characterization describes the second 1984 amendment to the LHWCA. The initial 1984 amendment also was curative, responding to a decision that "changed key components of what had widely been regarded as the proper rules" (H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984)); in addition, because the

The United States (see Br. 20-22) and CSG (see Br. 14-16) also claim to find it difficult to identify "curative" (or, for that matter, "purely retroactive") laws. But these distinctions surely provide more guidance to courts and legislatures than does the vague notion of "harsh and oppressive" legislation invoked by the United States (Br. 11) or the laundry list of equitable factors offered by CSG (Br. 24-30). Beyond that, the concept of curative legislation is not our invention; as Justices White and Blackmun noted in *Van Emmerik* (454 U.S. at 1132-1133), it has been applied by this Court for most of this century—a line of decisions that the United States and CSG simply disregard. See, *e.g.*, *Paramino*, 309 U.S. at 378; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 296, 302 (1937) (Stone, J.); *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931) (Hughes, C.J.); *Saranac Land & Timber Co.* v. *Comptroller*, 177 U.S. 318, 330 (1900). These decisions reflect the fact that curative laws are unlikely to upset settled expectations because they merely correct a technical and inadvertent defect in the law, thus maintaining the status quo as understood by both government officials and private parties.

C. The cases cited by the United States (Br. 21) do nothing to "cast grave doubt" on our statement that the Court has never upheld a purely retroactive, non-curative statute. In fact, it is not at all clear that the government itself believes its assertion; its carefully qualified argument states only that the statutes involved in its examples "arguably" might be characterized as purely retroactive (Br. 20, 21). For example, *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933), involved a state law authorizing interest on unliquidated damages in contract actions; the law was enacted after the contract at issue was entered into, but before an action was brought or judgment rendered. *Id.* at 165. As the United States itself recognizes (Br. 20), the law governed the conditions attached to *future* judgments rendered in inchoate lawsuits; unlike the Michigan statute, it did not reopen closed periods of liability and thus was not purely retroactive.[12]

Similarly, the cases upholding the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262, do not support respondents because the statute at issue was an example of legitimate curative legislation. The Act was a response to the decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which, in requiring overtime pay for time spent by employees en route to their work sites, "was wholly unexpected by the overwhelming majority of both the unions and the employees [and] suddenly opened the door to billions of dollars of back-pay claims against employers who had not included this time in computing the number of hours worked by their employees." Slawson, 48 CALIF. L. REV. at 228 (footnote omitted).

In precluding backpay claims premised on the theory announced in *Mt. Clemens*, the Act was expressly designed to preserve the status quo by permitting awards that were grounded on "a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed." 29 U.S.C. § 252(a)(2). What is more, the Act applied only to pending or future claims; pre-enactment payments (whether or not the result of a judgment) were unaffected. Thus, "viewed realistically, it was the Supreme Court's unexpected decision, rather than the statute, which was the primary source of retroactivity." Hochman, 73 HARV. L.

---

statute applied only to cases pending on the date of enactment, it was not purely retroactive. And CERCLA, like the statute at issue in *Turner Elkhorn*, attaches *prospective* consequences to past acts.

[12] *League* v. *Texas*, 184 U.S. 156 (1902), upheld a statute providing for the retroactive assessment of interest on back taxes because "interest is the ordinary incident to the non-payment of obligations" (*id.* at 162)—a holding that says nothing about whether substantive obligations may be changed retroactively. And the Renegotiation Act, involved in *Lichter* v. *United States*, 334 U.S. 742, 788 (1948), by its terms permitted recovery of profits only under "future contracts and * * * contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act." It therefore did not reopen finally settled transactions.

REV. at 721 n.155. Contrary to CSG's assertion (Br. 11), therefore, the Portal-to-Portal Act is distinguishable from the 1987 amendment. The former ratified the pre-existing practice and reinforced reasonable expectations; the latter undid five years' worth of transactions.[13]

D. Under this Court's decisions, the 1987 amendment violates due process. The statute is purely retroactive, making past acts wrongful even though they were lawful when performed. The United States and CSG do not contend otherwise; rather, their principal assertion—that the statute did not disturb reliance interests because it effectuated the legislature's original intent—rests largely on self-serving, extra-record expressions of "surprise" issued after the Michigan Supreme Court rendered its decision in *Chambers*. See CSG Br. 2; Romein Br. 7-8. Those expressions are belied by *Chambers* itself, where a unanimous court found that coordination was required by the 1981 law's "clear[] and unambiguous[]" language as well as by its plain legislative history. 375 N.W.2d at 721, 725 & nn. 14, 18. In fact, the majority below did not take issue with Chief Justice Riley's conclusion, based on an extensive canvass of the legislative background (see Pet. App. 31a-37a), that the 1987 amendment was a conscious and dramatic *departure* from the intent underlying the 1981 statute.[14]

---

[13] *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 392 (1989), is equally inapposite, because the statute at issue ratified administrative practice and thus was a classic curative act. The other decisions cited by CSG (Br. 12) were expressly grounded on the distinction between curative and other types of retroactive laws. See *Paramino*, 309 U.S. at 378-379; *Swayne & Hoyt*, 300 U.S. at 302; *Graham & Foster*, 282 U.S. at 429.

[14] Without supporting citation, CSG makes the startling assertion (Br. 17) that the Michigan legislature rather than the state judiciary has the ultimate responsibility to interpret legislation because "Michigan has * * * chosen to give its legislature the option of acting as a court of last resort on questions of statutory construction." In fact, in Michigan as elsewhere, "the proper construction of a statute is a judicial function" (*Webster* v. *Rotary Electric Steel Co.*, 33 N.W.2d 69, 70 (Mich. 1948)) and the legislature "may not by statute attempt to exercise judicial power by construing a statute for the court." *Bankers' Trust Co.* v. *Russell*, 249 N.W. 27, 30 (Mich. 1933).

The 1987 amendment therefore did not cure a technical and inadvertent oversight or omission. Instead, it reversed an important and hotly debated policy decision in the 1981 law. Indeed, the State frankly concedes in this Court that the 1987 statute "reflected the latest in a continuing series of policy choices made by the Michigan Legislature." Mich. Br. 5; see *id.* at 54.[15]

E. Even apart from the special scrutiny due purely retroactive laws, the 1987 amendment is unconstitutionally arbitrary. In arguing to the contrary, the United States declares it evident that the 1987 law was intended to undo the 1981 legislation and in fact "had the effect that the Michigan Supreme Court described." Br. 25. But this analysis is circular; it would premise constitutionality on " 'a mere tautological recognition of the fact that [the legislature] did what it intended to do.' " *Logan*, 455 U.S. at 441 (opinion of Blackmun, J.) (citation omitted). If that were the test, no statute would ever fail the rational basis test.

The United States also misunderstands our argument when it suggests (Br. 27) that we "merely quibble with the means the Michigan legislature used." Our point is that the *mismatch* between the legislature's "means" and ends is so great as to belie the claims that the 1987 amendment rationally advances the statutory goal hypothesized by the court below. If the legislature truly intended to ease the financial burden on employees injured prior to 1982, why would it have increased the benefits

---

[15] It cannot be dispositive, as CSG contends (Br. 10, 14), that the Michigan legislature labeled the 1987 statute curative. " 'The presence of "curative" language, or a recital that the Legislature in the past really intended what is now being enacted into law, cannot render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional attack merely by the insertion of such language.' " *Vytar Associates* v. *City of Annapolis*, 483 A.2d 1263, 1271 (Md. 1984), quoting *Washington National*, 410 A.2d at 1069.

only to those employees with *other* sources of wage-replacement income? See Pet. Br. 49-50. Needless to say, it is equally doubtful that the 1987 law rationally serves the wholly imaginary purposes conjured up for it by CSG (Br. 22-23).

Finally, in accord with their general disregard for unfavorable authority, respondents, the United States, and CSG do not even bother to discuss *Alton*, where this Court invalidated as arbitrary a statute that closely resembles the 1987 amendment. Although the State for its part dismisses *Alton* by attempting to analogize the statute there at issue to the black lung benefit provisions upheld in *Turner Elkhorn* (Mich. Br. 62), its conclusory assertion simply ignores the critical distinctions between the two statutes. See Pet. Br. 48-49.

F. In sum, it is not our contentions that would have the Court "shift gears dramatically." U.S. Br. 19. To the contrary, it is respondents and their *amici* who wholly ignore a very substantial body of this Court's decisions. Because the 1987 amendment is " 'a bare attempt of the legislature retroactively to create liabilities for transactions . . . fully consummated in the past,' " it cannot be sustained. *Swayne & Hoyt*, 300 U.S. at 302 (citation omitted).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

THEODORE SOURIS
MARTHA B. GOODLOE
DAVID P. LARSEN
Bodman, Longley & Dahling
34th Floor
100 Renaissance Center
Detroit, Michigan 48243

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
MARK I. LEVY
JAMES D. HOLZHAUER
CHARLES A. ROTHFELD
LAWRENCE C. MARSHALL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

RODERICK D. GILLUM
DANIEL G. GALANT
JOHN G. RAHIE
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

JOHN M. THOMAS
Ford Motor Company
Parklane Towers West
Three Parklane Boulevard
Dearborn, Michigan 48126

Counsel for Petitioners

OCTOBER 1991

(14)

No. 90-1390

Supreme Court, U.S.
FILED
SEP 5 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

EVERT ROMEIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAVID S. FORTNEY
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

We will address the following question:

Whether a 1987 Michigan law that required employers to pay additional workers' compensation benefits to certain employees for the period from 1982 to 1987 violates the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
I. The Court should review the 1987 Michigan law under the "arbitrary and irrational" standard	9
A. Economic legislation, including legislation with retroactive effect, is presumed to be constitutional, and the party alleging a violation of due process must show that the law is arbitrary and irrational	9
B. This Court's decisions show that a legislature rationally may apply economic legislation retroactively	12
C. The Court's established approach is justified by the wide variety of circumstances in which retroactive legislation is useful	14
D. The Court should not adopt the restrictive rules petitioners propose for reviewing due process challenges to retroactive legislation	19
II. The 1987 Michigan statute is neither arbitrary nor irrational	24
A. The 1987 Michigan law serves a legitimate legislative purpose	24
B. The 1987 Michigan law furthers legislative intent in a rational manner	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adkins v. *Children's Hospital*, 261 U.S. 525 (1923)	13
Aduddell v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131 (1984)	16

Cases—Continued: Page

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 5
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 26
Calder v. *Bull*, 3 U.S. (1 Dall.) 386 (1798) 11
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 24, 27
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 7, 10, 13, 14, 19
Forbes Pioneer Boat Line v. *Board of Comm'rs*, 258 U.S. 338 (1922) 22
Franks v. *White Pine Copper Division*, 422 Mich. 636, 375 N.W.2d 715 (1985) 3
Funkhouser v. *J.B. Preston Co.*, 290 U.S. 163 (1933) 11, 20
Graham & Foster v. *Goodcell*, 282 U.S. 409 (1931) 22, 28
Kaiser Aluminum & Chem Corp. v. *Bonjorno*, 110 S. Ct. 1570 (1990) 20, 21
League v. *Texas*, 184 U.S. 156 (1902) 20
Lichter v. *United States*, 334 U.S. 742 (1948) 11, 21
Louviere v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985) 16
McKesson Corp. v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) 11, 21, 23
Moss v. *Hawaiian Dredging Co.*, 187 F.2d 442 (9th Cir. 1951) 26
National R.R. Passenger Corp. v. *Atchison, T. & S. F. Ry.*, 470 U.S. 1 (1976) 9, 10
Nacirema Operating Co. v. *Lynn*, 577 F.2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979) 17-18
Norfolk, Baltimore & Carolina Lines v. *Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977) 18
Olsen v. *Nebraska*, 313 U.S. 236 (1941) 25
Pauley v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991) 15
Pension Benefit Guar. Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 4, 6, 9, 10, 13, 14, 19, 24
Pennsylvania Nat'l Mut. Casualty Ins. Co. v. *Spence*, 591 F.2d 985 (4th Cir.), cert. denied, 444 U.S. 963 (1979) 28

Cases—Continued: Page

Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 15
Puig v. *Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979) 17
Rowan Cos. v. *United States*, 452 U.S. 247 (1981) 26
State Ins. Fund v. *Pesce*, 548 F.2d 1112 (2d Cir. 1977) 18
Taddeo v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (1989) 17
Temple Univ. v. *United States*, 769 F.2d 126 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986) 23, 26
Todd Shipyards Corp. v. *Witthuhn*, 596 F.2d 899 (9th Cir. 1979) 17
Travelers Ins. Co. v. *Marshall*, 634 F.2d 843 (5th Cir. 1981) 17
United States v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) 10, 25
United States v. *Darusmont*, 449 U.S. 292 (1981) 23
United States v. *Heinszen & Co.*, 206 U.S. 370 (1907) 22
United States v. *Locke*, 471 U.S. 84 (1985) 10
United States v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) 18
United States v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) 18
United States v. *Sperry Corp.*, 110 S. Ct. 387 (1989) 10, 13
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 2, 4, 6, 9, 10, 11, 12, 26
Van Emmerik v. *Janklow*, 454 U.S. 1131 (1982) 22
Washington Metro. Area Transit Authority v. Johnson, 467 U.S. 925 (1984) 15
Welch v. *Henry*, 305 U.S. 134 (1938) 11, 21
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 10, 14, 27

Constitution and statutes:

U.S. Const.:
Art. I, § 10, Cl. 1 (Contract Clause) 1, 5, 24

Constitution and statutes—Continued: Page

Amend. V (Due Process Clause) 1, 2, 10, 18, 23, 24, 25
Amend. XIV (Due Process Clause) 1, 2, 6, 9, 10, 11, 21, 24, 25, 27
Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251:
§ 5(c), 86 Stat. 1253 17
§ 5(d), 86 Stat. 1254 17
Act of Sept. 28, 1984, Pub. L. No. 98-426, 98 Stat. 1639:
§ 2(b), 98 Stat. 1639 (33 U.S. 902(10)) 17
§ 4, 98 Stat. 1641 (33 U.S.C. 904(a), 905(a)) 15-16
§ 11(a), 98 Stat. 1648 (33 U.S.C. 912(a)) 17
§ 12(b)(2), 98 Stat. 1649 (33 U.S.C. 913(b)(2)) 17
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 1
30 U.S.C. 932(c) 15
30 U.S.C. 945 14
30 U.S.C. 945(a)(2)(A) 15
30 U.S.C. 945(b)(1) 15
30 U.S.C. 945(c) 15
Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 205, 95 Stat. 1645 15
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.* 7, 18
42 U.S.C. 9607 18
Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 502, 99 Stat. 438 13
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 1, 15
33 U.S.C. 902(10) (1982) 16
33 U.S.C. 902(10) 17
33 U.S.C. 904(a) 16
33 U.S.C. 905(a) 16
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ..... 6, 12

Statutes—Continued: Page

Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (29 U.S.C. 251-262) 26
29 U.S.C. 251(a) 26
29 U.S.C. 252(a) 26
29 U.S.C. 252(d) 26
Mich. Comp. Laws Ann. (1985 & Supp. 1991):
§ 418.351 2
§ 418.354(1) 2
§ 418.354(17)-(20) 3
§ 418.435 28
§ 418.611 27
§ 418.621(2)(a) 28
Mich. Stat. Ann. (Callaghan 1988 & Supp. 1991):
§ 17.237(351) 2

Miscellaneous:

Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379 21
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 15
H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. (1984) 16
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) 21
4 A. Larson, *Workmen's Compensation Law* (1990) 28
McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12 (1967) 19, 20, 21
Nelson, *Workers' Compensation: Coverage, Benefits, and Costs, 1988*, Soc. Sec. Bull. (March 1991) 27
2 *Selected Essays on Constitutional Law* (Ass'n of Am. L. Sch. ed. 1938) 21
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 14
Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216 (1960) 21, 26

Miscellaneous—Continued: Page

Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936) 21
Smith, *Retroactive Laws and Vested Rights*: 5 Tex. L. Rev. 231 (1927) 21

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1390

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

EVERT ROMEIN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

In this case, the Michigan Supreme Court upheld a 1987 workers' compensation law that required employers to pay additional benefits for the period from 1982 to 1987 to employees injured prior to 1982. Petitioners urge reversal of that decision on the grounds that the retroactive effect of the law violates the Contract Clause, Art. I, § 10, Cl. 1, and the Due Process Clause of the Fourteenth Amendment.

While the Contract Clause does not apply to the federal government, retroactive laws enacted by Congress are subject to review under the Due Process Clause of the Fifth Amendment. Two laws administered by the Department of Labor, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, create federal workers' compensation programs, and both pro-

grams have been amended at various times to include provisions with retroactive effect. One such provision in the Black Lung Benefits Act was upheld by this Court against a due process challenge in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The Court has made clear in *Turner Elkhorn* and elsewhere that the constraints imposed on retroactive legislation by the Due Process Clauses of the Fifth and the Fourteenth Amendments are the same. Therefore, the United States has a vital interest in the due process issue presented by this case.

STATEMENT

1. During 1980 and 1981, Michigan passed a series of laws to reform the State's workers' compensation program. Two of the laws are relevant here. One law, enacted in 1980, raised the maximum disability benefit. That law was entirely prospective, applying only to benefits for injuries that occurred after January 1, 1982. Mich. Comp. Laws Ann. § 418.351 (West 1985 & Supp. 1991); Mich. Stat. Ann. § 17.237(351) (Callaghan 1988 & Supp. 1991); Pet. App. 2a, 9a.

The other reform, enacted in 1981, provided for "coordination" of workers' compensation benefits and certain other employee benefits. The 1981 coordination provision permitted employers to reduce workers' compensation benefit payments by the employer-financed share of certain other benefits the employee received, such as benefits paid pursuant to pension plans. Mich. Comp. Laws Ann. § 418.354(1) (West 1985 & Supp. 1991). The coordination provision had an effective date of March 31, 1982, but it did not specify whether coordination applied to all benefit payments made after that date, or only to benefit payments for injuries that occurred after that date.

After the 1981 coordination provision took effect, petitioners began coordinating benefit payments to workers injured before March 1982 as well as to workers injured after that date. Pet. App. 60a. Thus, they interpreted the coordination of benefits law to apply retroactively as well as prospectively. Petitioners' interpretation was not universally shared. "The [Michigan] House and Senate both adopted legislative resolution[s] in early 1982, purporting to interpret [the coordination provision] to prevent the coordination of benefits of persons injured before the effective date." Pet. App. 3a n.2.

In 1985, the Michigan Supreme Court upheld petitioners' interpretation of the coordination provision in *Franks* v. *White Pine Copper Division*, 422 Mich. 636, 375 N.W.2d 715 (1985). The court held that the provision "clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods subsequent to its effective date, regardless of when the injury occurred." 422 Mich. at 651, 375 N.W.2d at 721. The court rejected arguments by the employees in that case that, so construed, the law was unconstitutionally retroactive. The court reasoned that workers' compensation payments do not compensate the recipient for a past injury but rather for the resulting loss of wage-earning capacity. 422 Mich. at 653-654, 375 N.W.2d at 722-723.

In May 1987, the Michigan legislature passed the law that gave rise to the present case. One provision of the 1987 law prohibited the future coordination of the workers' compensation benefits of workers injured before March 1982. Another provision of the 1987 law—the provision at issue here—required employers to pay (with interest) benefits withheld from employees injured before March 1982 as a result of the application of the coordination of benefits law. Mich. Comp. Laws Ann. § 418.354(17)-(20) (West 1985 & Supp. 1991). Thus, the practical effect of the 1987 law was to negate the retroactive effect of the 1981 law. That is, under the 1987 law employees injured prior to 1982 were not to be subject after 1987 to the coordination of benefits law, just as they were not subject to the 1980 law increasing workers' compensation benefit levels. In addition, employees injured before 1982 were to be reimbursed for losses they suffered between 1982 and 1987 on account of the retroactive application of the coordination of benefits law to them.

2. Respondents Evert Romein and Arturo Gonzalez are former employees of petitioners General Motors Corporation and Ford Motor Company, respectively. Both Romein and Gonzalez were injured and began receiving uncoordinated workers' compensation benefits before 1982. Each suffered a reduction in those benefits after 1982 when their benefits were coordinated by petitioners. Pet. App. 2a, 63a.

Both Romein and Gonzalez successfully contested the coordination of their benefits in administrative hearings conducted by the Michigan Bureau of Workers' Compensation. Those hearings occurred before the Michigan Supreme Court held in *Franks* that the 1981 coordination of benefits law applied to employees injured before 1982. The ruling in favor of Romein was then reversed, in light of *Franks*, by the Michigan Workers' Compensation Appeal Board. Gonzalez's appeal was not decided until after the 1987 law had taken effect, and the Board upheld the ruling in favor of Gonzalez under that law. The Michigan Court of Appeals subsequently consolidated the cases and ruled in favor of the employees. Pet. App. 58a-69a.

3. The Michigan Supreme Court, sitting en banc, affirmed the court of appeals' decision. It held that the 1987 Michigan law "may validly be applied to all compensation liabilities within its terms except those which have been reduced to final judgment before its enactment." Pet. App. 1a.

In rejecting the employers' Due Process Clause challenge, the court relied on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984). The court determined, first, that the 1987 law satisfied the "rational relationship" analysis set forth in those two decisions. It explained: "The retroactive portions of the statute * * * are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed." Pet. App. 9a. The court then determined that GM and Ford could not reasonably have relied on the prior state of the law, since the law was "in a state of flux" from 1982 to 1987. *Id.* at 12a. Finally, the court found, GM and Ford did not have a "vested" or "contractual" right to the level of payments they had made. In this connection, the court emphasized that the 1987 law "does not create a new entitlement conferring a disability status not provided under prior law." *Id.* at 13a.

The court adopted alternative holdings in rejecting the employers' Contract Clause claim. It initially held that the employers' reliance on a previous level of workers' compensation benefits is not "a legitimate contractual expectation protected by the Contract Clause." Pet. App. 14a. In the alternative, the court held that the 1987 law did not unconstitutionally impair contract obligations under the three-part analysis set forth in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). First, the degree of impairment of petitioners' rights was not substantial, the court concluded, since the employers retained the "basic benefit" of limited tort liability for work-place injuries. Pet. App. 15a. Second, the court found the state interest underlying the 1987 law—to "protect[] the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim"—to be "significant." *Id.* at 16a. Third, the court stated that the degree of retroactivity was "reasonable" since "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Id.* at 17a.[1]

---

[1] In their challenge based on the Michigan Constitution, the employers argued that the 1987 statute impermissibly encroached on matters confided to the judiciary. The court rejected that argument, finding it sufficient that the law did not "impair final judgments." Pet. App. 18a.

SUMMARY OF ARGUMENT

I. The proper approach to judicial review of economic legislation challenged on due process grounds is well established. Such legislation "come[s] to the Court with a presumption of constitutionality" and "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). It is equally well settled that the same deferential standard of review applies to economic legislation that has retroactive effect. *Id.* at 729; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Due Process Clauses give legislatures broad discretion in adjusting economic rights and duties, and the "vague contours" of due process do not prescribe limits on a legislature's authority to make retroactive adjustments any more than they dictate other line-drawing decisions that enter into the drafting of economic legislation. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963).

This Court has accordingly upheld retroactive economic legislation, including legislation providing for workers' compensation, that rationally furthers legitimate legislative objectives. In *Turner Elkhorn*, for example, the Court rejected a due process challenge to a provision of the Black Lung Benefits Act that required coal mine operators to pay compensation to former employees who had left the industry before the effective date of the Act. Similarly, in *Gray*, the Court upheld a provision of the Multiemployer Pension Plan Amendments Act of 1980 that imposed withdrawal liability on employers who withdrew from multiemployer plans before the amendments became law. In each case, the Court found that retroactive legislation was a rational method of responding to a serious social problem.

The wisdom of this Court's established approach is confirmed by consideration of the wide variety of problems that Congress has concluded can best be solved through

legislation with retroactive features. Of particular relevance here, Congress has amended two federal workers' compensation statutes on various occasions to include provisions having retroactive effect. In each instance, Congress reasonably determined that retroactive legislation was necessary to respond to problems such as those presented by workers who contract occupational diseases having long latency periods. Workers' compensation is not the only social problem that has been rationally approached through retroactive federal legislation, however, as Congress's retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) illustrates. As was the case with latent occupational diseases, Congress determined that the problems presented by the build-up of hazardous wastes were best remedied by legislation having retroactive effect.

This Court should not abandon the flexible approach it has applied in favor of the rigid rules petitioners propose. In summary, petitioners contend that "purely" retroactive legislation should be considered "presumptively unconstitutional," and should be upheld under the Due Process Clause only if it is "curative" or does not "reach back beyond the session of [the legislature's] immediate predecessor." Pet. Br. 38, 39, 43. The fundamental flaw in petitioners' proposal is that it contravenes the proper role of reviewing courts by restricting legislative discretion in matters that the Constitution assigns to legislatures. In any event, petitioners' rules are premised in part on ill-defined distinctions between laws that are "purely" retroactive and laws that are not, and between laws that are "curative" and laws that are not. In addition, petitioners' proposal to restrict the retroactive effect of legislation to one prior legislative term is simply borrowed from Congress's practice in the tax area, even though legislatures may need more flexibility in dealing with other problems.

II. The 1987 Michigan law furthers a legitimate legislative purpose in a rational manner and should therefore be upheld. The effect of the 1987 law was simply to undo the effect of the retroactive application of the 1981 coordination of benefits law to persons injured before 1982. As the Michigan Supreme Court stated, it made particular sense to negate the retroactive application of the coordination of benefits law because employees injured before 1982 did not benefit from the 1980 law that increased workers' compensation benefits.

Petitioners suggest that it would have made more sense for the Michigan legislature to apply the law increasing benefit levels retroactively to all persons injured before 1982. But the legislature certainly did not act irrationally by deciding to treat employees injured before 1982 according to the rules in effect at the time they were injured, and to treat employees injured after 1982 in accord with the rules in effect at that time. In addition, petitioners' argument that the 1987 law should be overturned because they made economic decisions based on their understanding that the 1981 law applied retroactively is not meritorious. As an initial matter, since petitioners had made insurance decisions prior to 1982 under the assumption that coordination of benefits was not allowed, they obtained a windfall when the coordination of benefits law was initially given retroactive effect. In addition, employees who were injured prior to 1982 similarly made decisions based on their expectations that they would receive uncoordinated benefits, and their reliance interests are at least as deserving as petitioners' reliance interests.

ARGUMENT

I. THE COURT SHOULD REVIEW THE 1987 MICHIGAN LAW UNDER THE "ARBITRARY AND IRRATIONAL" STANDARD

This Court has consistently applied the "arbitrary and irrational standard" in assessing challenges to retroactive legislation based on the Due Process Clauses. There is no good reason to accept petitioners' invitation to apply a stricter standard.

A. Economic Legislation, Including Legislation With Retroactive Effect, Is Presumed To Be Constitutional, And The Party Alleging A Violation Of Due Process Must Show That The Law Is Arbitrary And Irrational

This Court's decisions do not support petitioners' contention (Pet. Br. 38) that retroactive legislation is in some cases presumptively unconstitutional. To the contrary, the Court's decisions make clear that retroactive economic legislation is not subject to "heightened judicial scrutiny" under the Due Process Clauses. *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984). Due process requires only that economic legislation, including legislation with retroactive effect, advance a legitimate legislative purpose in a rational way.

"It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Gray*, 467 U.S. at 729; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Accord *National R.R. Passenger Corp.* v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451, 463 (1985) (a "firmly established presumption of constitutionality * * * attaches to legislative Acts 'adjusting the burdens and

benefits of economic life' ").[2] Such legislation is constitutional if it furthers a legitimate legislative purpose in a rational way. See, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 104 (1985); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); see also *National R.R. Passenger Corp.*, 470 U.S. at 477.

"[T]he strong deference accorded legislation in the field of National economic policy is no less applicable when that legislation is applied retroactively." *Gray*, 467 U.S. at 729. Of course, "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively." *Turner Elkhorn*, 428 U.S. at 16. "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process." *Id.* at 17. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989). "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Gray*, 467 U.S. at 729.

The Court's approach to the review of retroactive economic legislation has deep roots. As the Court observed in *Turner Elkhorn*, the cases "are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." 428 U.S. at 16

[2] State laws challenged under the Due Process Clause of the Fourteenth Amendment and federal laws challenged under the Due Process Clause of the Fifth Amendment are governed by the same analysis. See, *e.g.*, *Turner Elkhorn*, 428 U.S. at 19, citing *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963) and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); see also *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 148 (1938).

(citations omitted). The Court's statement applies to review of both federal and state laws with retroactive effect. *Ibid.*, citing, *inter alia*, *Lichter* v. *United States*, 334 U.S. 742, 788-789 (1948) (upholding application of the federal Renegotiation Act, which authorized the recovery of excessive profits by government contractors, to contracts executed before its enactment), and *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163, 167-169 (1933) (upholding a state law retroactively authorizing the recovery of interest in contract actions for unliquidated damages). For at least the last 50 years, it has been settled that "[t]he mere fact that * * * legislation is retroactive does not bring it into conflict with the guarantees of the Federal Constitution." *Funkhouser*, 290 U.S. at 167-168.[3]

While the Court has consistently refused to adopt a *per se* rule invalidating economic legislation with retroactive effect, it has also made clear that due process imposes certain limits. The Court has warned that economic legislation, whether prospective or retrospective, may be "so harsh and oppressive as to transgress the constitutional limitation" of due process. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2252 n.23 (1990), quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). Moreover, the Court has "take[n] into account" reliance on prior law in determining whether retroactive legislation is "so harsh and oppressive" that it runs afoul of due process strictures. *Turner Elkhorn*, 428 U.S. at 17. This Court's decisions thus

[3] Indeed, one of this Court's earliest decisions upheld a retroactive state statute. In *Calder* v. *Bull*, 3 U.S. (1 Dall.) 386 (1798), the Court rejected a challenge under the *ex post facto* clause to a Connecticut law that retroactively granted a new trial in a probate case. While *Calder* was decided before the Fourteenth Amendment was added to the Constitution, the decision illustrates the Court's longstanding attitude toward retroactive legislation. Justice Chase stated that, while laws should ordinarily operate prospectively, "there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement." *Id.* at 391.

make clear that, while due process grants legislatures broad discretion in matters of social and economic policy, it also requires courts to safeguard individual interests against arbitrary legislative action.

B. This Court's Decisions Show That A Legislature Rationally May Apply Economic Legislation Retroactively

In its most recent decisions regarding the constitutionality of retroactive legislation, this Court has addressed statutes adjusting the benefits and burdens of economic life. The Court's opinions demonstrate that a legislature may rationally implement its judgments as to how those benefits and burdens should be distributed through retroactive legislation. Those decisions also show that a legislative judgment to give retroactive effect to a law, like other judgments that enter into the drafting of economic legislation, reflects policy decisions that the Constitution largely confides to legislatures, not the courts.

At issue in *Turner Elkhorn* was a retroactive provision that embodied Congress's judgment about how to allocate the costs incurred by coal miners disabled by black lung disease. 428 U.S. at 6-8. The provision required coal mine operators to compensate former employees who had left the industry before the effective date of the Act, and the Court upheld Congress's decision to allocate the costs of black lung disease "by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business." *Id.* at 18. The Court concluded that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the [mine] operators and the coal consumers." *Ibid.*

In *Gray*, the Court upheld provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) that required employers who withdrew from multiemployer pension plans within five months prior to the enactment of the 1980 amendments to pay their share of unfunded vested benefits. See 467 U.S. at 723-725. Under prior law, withdrawing employers did not have to make such payments. *Id.* at 721. The Court held that retroactive application of the withdrawal provisions was rational because, otherwise, some employers would have had a strong economic incentive to withdraw from multiemployer plans while the legislation was pending, leaving the plans with unfunded liabilities. *Id.* at 730-731. Since making plans financially stable was one of Congress's primary purposes, the Court determined that "it was eminently sensible for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively." *Id.* at 730.

In *Sperry*, the Court upheld the retroactive application of Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 438, which charged a fee to successful claimants before the Iran-United States Claims Tribunal. 110 S. Ct. at 396-397. Retroactive application, the Court observed, "ensure[d] that all successful claimants before the Tribunal are treated alike in that all have to contribute toward the costs of the Tribunal." *Id.* at 396. The Court found that "[i]t [was] surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *Ibid.*

The decisions in *Turner Elkhorn*, *Gray*, and *Sperry* reflect long established principles governing due process review of economic legislation and show that those principles fully apply to legislation with retroactive effect. They illustrate that the "vague contours" of due process require reviewing courts to accord broad discretion to legislative judgments about the wisdom and utility of economic legislation. *Ferguson* v. *Skrupa*, 372 U.S. at 731, quoting *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting). In the absence of

fixed constitutional standards, there is a danger that "courts [may] substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." 372 U.S. at 730. Because they are accountable to the public, legislatures are better suited than courts "to balance the advantages and disadvantages" of economic legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487 (1955). And as *Turner Elkhorn*, *Gray*, and *Sperry* demonstrate, a legislature may rationally strike the balance among competing economic interests in favor of retroactive application.

C. The Court's Established Approach Is Justified By The Wide Variety Of Circumstances In Which Retroactive Legislation Is Useful

In *Gray*, the Court rejected efforts by the lower court (467 U.S. at 727 n.6) and by the parties (*id.* at 731-734) to devise a special formula for judicial review of retroactive legislation. The Court has properly avoided adopting rigid rules in this context and has adhered to the due process analysis applicable to all economic legislation. Review of some of the circumstances in which Congress has decided to legislate retroactively illustrates why such legislation should not be regarded as presumptively unconstitutional, but should instead be reviewed under the "arbitrary and irrational" standard.

In addition to the retroactive aspect of the Black Lung Benefits Act that was upheld in *Turner Elkhorn*, Congress also amended the Act in 1978 and provided that its amendment would have retroactive effect. Congress acted retroactively because it had determined that the eligibility standards in the existing program were too strict and that many deserving claims by "old and sick miners and their widows" had been unjustly denied. S. Rep. No. 209, 95th Cong., 1st Sess. 1 (1977). To remedy that problem, Congress enacted more liberal eligibility standards that applied not only to future claims but also to claims pending or denied under prior law. 30 U.S.C. 945.

In accordance with the 1978 amendments, thousands of previously unsuccessful claimants had their cases reopened and administratively readjudicated under the new criteria. See generally *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2529-2530 (1991); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 111 (1988). Claimants who succeeded on the second try were awarded benefits "on a retroactive basis" covering periods extending more than four years before enactment of the 1978 Amendments. 30 U.S.C. 945(c). The cost of those awards was borne by coal mine operators or the operator-funded Black Lung Disability Trust Fund. 30 U.S.C. 945(a)(2)(A), 945(b)(1); H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 21-22 (1978).[4] The coal mine operators did not mount a due process challenge to the 1978 Amendments, but if they had the courts properly would have concluded, in our view, that Congress was justified in ordering the reopening of claims that were denied under standards that were more stringent than it desired.[5]

Congress has also amended the workers' compensation program established by the Longshore and Harbor Workers' Compensation Act (LHWCA) in ways that have had retroactive impact. Two examples are found in 1984 amendments to the LHWCA. One amendment responded to *Washington Metro. Area Transit Authority* v. *Johnson*, 467 U.S. 925 (1984), which established that a general contractor was immune from tort suits brought by a subcontractor's employees unless the general contractor had neglected to secure compensation coverage for those employees after the subcontractor failed to do so. Congress amended the LHWCA to change that result, and provided that the amendment applied to cases pending on the date of enactment. Pub. L. No. 98-426, § 4, 98 Stat.

---

[4] In 1981, Congress transferred liability for all reopened claims to the Trust Fund. Pub. L. No. 97-119, § 205, 95 Stat. 1645, codified at 30 U.S.C. 932(c).

[5] In reviewing regulations implementing the 1978 amendments, this Court did not suggest that its retroactive features rendered it unconstitutional. See *Pittston Coal Group*, 488 U.S. at 122.

1641, codified at 33 U.S.C. 904(a), 905(a). The conference report explained that the holding in *WMATA* did not comport with "what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the [LHWCA]." H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984). The report added that the amendment was intended to "avoid the dismissal, under *WMATA*, of third-party suits which were pending or on appeal on the date of enactment." *Ibid.* This provision was upheld against a due process challenge on retroactivity grounds in the only case in which it was challenged.[6]

Another 1984 amendment to the LHWCA authorized the award of disability and death benefits for occupational diseases that, because of long latency periods, first appear after retirement. Prior law had defined "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or another employment." 33 U.S.C. 902(10) (1982). In *Aduddell* v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131 (1984), the Department of Labor's Benefits Review Board had relied on that definition to deny benefits to a claimant who voluntarily retired before manifesting work-related asbestosis. The Board reasoned that, because the claimant had retired voluntarily, he could not prove that asbestosis caused any loss of wage-earning capacity. *Aduddell*, 16 Ben. Rev. Bd. Serv. (MB) at 133. Seven months after *Aduddell* was decided by the Board, Congress redefined

[6] In that case, *Louviere* v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985), the court of appeals, applying the 1984 amendment, held that a general contractor was subject to suit by the employee of a subcontractor, where the subcontractor had secured workers' compensation coverage under the Act. In reversing the district court, the court of appeals acknowledged that the district court, which had applied *WMATA*, had reached the correct result under the holding in that case. *Id.* at 429. The court of appeals held that the general contractor's due process challenge to the retroactive application of the 1984 amendment was "without merit." *Id.* at 430.

"disability" to remove the requirement that a retired claimant prove that an occupational disease caused a loss of wage-earning capacity. Pub. L. No. 98-426, § 2(b), 98 Stat. 1639, amending LHWCA § 2(10), 33 U.S.C. 902(10). Since Congress also provided that the limitations period should run from the date on which the employee or claimant became aware of the relationship between the employment, the disease, and the death or disability, §§ 11(a) and 12(b)(2), 98 Stat. 1648-1649, codified at 33 U.S.C. 912(a) and 913(b)(2), employers could be required to pay compensation for pre-enactment periods based on a disability that would not have been compensable under prior law.[7] But it was not arbitrary and irrational for Congress to have determined that employers should be required to provide benefits to former employees (or their survivors) who suffered from asbestosis in their old age on account of exposure to asbestos while they were working.[8]

[7] The potentially significant retroactive impact of the 1984 amendments is illustrated in *Taddeo* v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (1989). The husband of the claimant in that case voluntarily retired in 1963 and died of lung cancer in 1965. His widow filed a claim for death benefits soon after a doctor told her in March 1982 that her husband's death was linked to exposure to asbestos at work. The Board held that she was entitled to a retroactive award of benefits calculated from the date of her husband's death.

[8] Like the 1984 amendments to the LHWCA, the 1972 amendments to that statute included provisions with retroactive effect. One such provision changed prior law by enabling survivors of permanently disabled workers to receive death benefits even when the worker's death was not caused by the employment-related injury. Pub. L. No. 92-576, §§ 5(c) and (d), 86 Stat. 1253-1254. In numerous cases, employers and insurance carriers challenged the provision as impermissibly retroactive insofar as it applied to workers injured prior to enactment. Those challenges were rejected in all six circuits that considered the issue. *Travelers Ins. Co.* v. *Marshall*, 634 F.2d 843, 845-848 (5th Cir. 1981); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F.2d 899, 902-903 (9th Cir. 1979); *Nacirema Operating Co.* v. *Lynn*,

Problems involving disabled workers are not the only problems that Congress has concluded can best be addressed by legislation with retroactive effect. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, imposed liability on persons who disposed of hazardous wastes prior to its enactment. Indeed, CERCLA's liability provisions may be applied in a manner that is entirely retroactive: persons may be held liable for the disposal of hazardous wastes prior to CERCLA's enactment, and the amount of their liability may reflect the costs of pre-enactment cleanup efforts. 42 U.S.C. 9607. The retroactive provisions of CERCLA have been upheld against Due Process Clause challenges by the two courts of appeals that have addressed the issue. Each court correctly held that Congress reasonably decided that the massive problem posed by hazardous wastes could be remedied only by retroactive legislation. *United States* v. *Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988) ("CERCLA operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions"), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-737 (8th Cir. 1986) ("[i]n order to be effective, CERCLA must reach past conduct"), cert. denied, 484 U.S. 848 (1987).

In sum, Congress repeatedly confronts problems that can best be solved by legislation that has retroactive effect. The variety of such problems, and Congress's need for flexibility in addressing them, confirm the wisdom of this Court's present approach to review. That approach affords legislatures needed flexibility to decide matters of

---

577 F.2d 852, 853-854 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *State Ins. Fund* v. *Pesce*, 548 F.2d 1112, 1114-1115 (2d Cir. 1977); and *Norfolk, Baltimore & Carolina Lines* v. *Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 380 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

social and economic policy while protecting individual economic interests from unjustifiably oppressive legislation.

D. The Court Should Not Adopt The Restrictive Rules Petitioners Propose For Reviewing Due Process Challenges To Retroactive Legislation

In the face of this settled body of authority, petitioners urge the Court to shift gears dramatically. Specifically, petitioners recommend that "purely" retroactive laws should be "presumptively unconstitutional," Pet. Br. 38, and that this Court should uphold such laws only if they are "curative," Pet. Br. 39, or do not "reach back beyond the session of [the legislature's] immediate predecessor," Pet. Br. 41. Here, as in *Gray* (467 U.S. at 727 n.6), the Court should decline an invitation to reduce judicial review of retroactive economic legislation to a rigid formula. The rules that petitioners propose cannot be reconciled with the limited review of economic legislation that is proper under the "vague contours" of due process, *Ferguson* v. *Skrupa*, 372 U.S. at 731; what is more, as a practical matter petitioners' approach is unworkable.

Petitioners base their proposed new rules on a distinction that one commentator has drawn between laws that are purely retroactive and laws that are partially retroactive. Pet. Br. 33-35, quoting McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12, 58-59 (1967). Under petitioners' scheme, as we understand it, the 1981 Michigan law that imposed coordination of benefit rules to injuries incurred before the law took effect (and reduced petitioners' liabilities to those injured workers) is an example of a partially retroactive statute because it affected benefit payments that were to be made for periods after the law was enacted. The 1987 law that undid the retroactive effect of the 1981 law (and imposed liabilities on petitioners for the period from 1982 to 1987), however, is purely retroactive because it related to past benefit periods.

At the outset, petitioners' approach poses serious classification problems. Many retroactive statutes cannot be definitely identified as either "purely" or "partially" retroactive. For example, a statute authorizing an award of interest in contract actions for unliquidated damages commenced after enactment could be considered either "purely" or "partially" retroactive. It is "purely" retroactive in the sense that it both alters the legal consequences of a breach of contract and fixes the amount of liability by reference to a past period. In those two respects, such a statute resembles the 1987 Michigan statute at issue here, which petitioners label "purely" retroactive. Nonetheless, our illustrative statute also satisfies petitioners' definition of "partially" retroactive statutes, since the statute would require unsuccessful defendants to make a payment of interest *after* the law is enacted and *after* an adverse judgment was entered. In those respects, the law "affect[s] the[] future legal consequences [of past acts] as of the time the new law is adopted." Pet. Br. 34 (quoting McNulty, 55 Calif. L. Rev. at 59). Thus, the answer to the threshold inquiry that petitioners propose "depends upon what one considers to be the determinative event." *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1588 n.3 (1990) (Scalia, J., concurring) (discussing the difficulty of determining whether a statute is prospective or retrospective).

This Court's decisions do not support petitioners' contention that due process draws a line between "partially" and "purely" retroactive laws. In *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933), the Court upheld against a due process attack a New York statute identical to the illustrative statute described above. As explained, that statute arguably qualifies as purely retroactive under petitioners' approach. See also *League* v. *Texas*, 184 U.S. 156, 160-162 (1902) (upholding against due process challenge a state law providing for the retroactive assessment of interest on delinquent taxes). In other cases, the Court has upheld statutes that, though

more difficult to classify, arguably were purely retroactive. For example, the Renegotiation Act upheld in *Lichter*, 334 U.S. at 788-789, which authorized the recovery of excessive profits earned by government contractors under contracts executed prior to its enactment, was purely retroactive in the sense that it reduced profits earned under contracts negotiated before the Act took effect. Such decisions cast grave doubt on petitioners' assertion (Pet. Br. 41) that the Court has never upheld a purely retroactive law that was not either "curative" or in compliance with the temporal limitation that petitioners propose.[9]

Petitioners' approach suffers from a more fundamental flaw because their distinction between purely and partially retroactive laws does not help decide whether a law is "so harsh and oppressive as to transgress the constitutional limitation" imposed by the Due Process Clauses. *McKesson*, 110 S. Ct. at 2252 n.23, quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). In this case, for example, the Michigan legislature could have passed a partially retroactive law that had a more severe impact on employers than the law it actually passed. For ex-

---

[9] Petitioners' classification scheme aside, it will often be "difficult * * * to decide whether a particular application *is* retroactive." *Kaiser*, 110 S. Ct. at 1587-1588 (Scalia, J., concurring). Commentators have been unable to agree on what makes a law impermissibly retroactive. See, *e.g.*, Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 428-447; McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Calif. L. Rev. 12, 57-59 (1967); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 217-220 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 781-782 (1936); Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927), *reprinted in* 2 *Selected Essays on Constitutional Law* 266, 267-268 (Ass'n of Am. L. Sch. ed. 1938). Petitioners' proposed distinction between "pure" and "partial" retroactivity only exacerbates the difficulty.

ample, the legislature might have raised future compensation rates for employees whose benefits had been coordinated in the past, or it could have required that each such employee be paid a uniform lump sum. Depending on the size of the rate increase or the lump sum, those alternatives could have had a greater financial impact on employers than the law actually enacted. Yet such laws would not be purely retroactive, and hence presumptively unconstitutional, under petitioners' scheme. This shows that petitioners' approach does not reliably identify especially harsh laws, but merely diverts the proper focus of due process analysis.

Petitioners' proposed exception allowing purely retroactive legislation that would "retroactively cure a defect in a statute by conforming [it] to past administrative practice," Pet. Br. 39, suffers from defects similar to their distinction between "purely" and "partially" retroactive laws. This Court's decisions show that "curative" legislation is difficult to identify. See *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1132 (1982), (White, J., dissenting from dismissal of appeal); compare *Forbes Pioneer Boat Line* v. *Board of Comm'rs*, 258 U.S. 338 (1922), with *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907); see also *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931). Moreover, a special rule for "curative" legislation would shift the focus of due process analysis away from whether a law is rational when all of its effects are considered to whether "reliance interests are * * * threatened." Pet Br. 40. And more significantly, petitioners' distinction between curative legislation and other sorts of retroactive legislation prohibits legislatures from responding to social problems if the response reflects a change in policy rather than the correction of technical error. See Pet. Br. 38. Such a rule ignores the latitude granted elected bodies under the Constitution to reassess prior policy in light of new information.

Similar difficulties attend petitioners' proposal to place an absolute temporal limitation on retroactive legislation.

Petitioners' proposal—to limit "the authority of a legislature to reach back beyond the session of its immediate predecessor," Pet. Br. 41—makes minimal disruption of settled expectations the centerpiece of due process review. But many problems require legislation with retroactive effects of longer duration than petitioners would permit. Problems like black lung disease and hazardous waste may exist for a long time and impose massive social costs before they are recognized. Once such problems are recognized, and the legislation to address them enacted, the further passage of time often yields new information that exposes inadequacies in prior law. The Due Process Clauses do not impose a time limit on legislatures' authority to respond in such circumstances, but require only that the response be rational.

Nor do decisions of this Court impose any such temporal requirement. Petitioners derive their proposed time limit from decisions of this Court referring to Congress's practice in the tax field, where " 'retroactive' application apparently has been confined to short and limited periods." *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981) (per curiam); see Pet. Br. 41. None of those decisions, however, suggests that due process compels this practice. Rather, the Court has stated that "beyond some temporal point" retroactive laws may offend due process, but it has never attempted to define that point. *McKesson*, 110 S. Ct. at 2252 n.23.[10] Furthermore, the specialized nature of tax law counsels against relying on Congress's self-imposed custom in that field to fashion a constitutional requirement. Moreover, the primary purpose of tax laws is to fund current government operations, a purpose that can usually be achieved

[10] Likewise, "no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity," even in reviewing tax legislation. *Temple Univ.* v. *United States*, 769 F.2d 126, 135 (3d Cir. 1985) (upholding the constitutionality of a 1984 law governing plaintiff's FICA tax liability for 1979 through 1982), cert. denied, 476 U.S. 1182 (1986).

through prospective legislation. In other areas, Congress rationally has decided that legislation with retroactive effect, and sometimes retroactive effect going back more than one legislative term, is necessary.[11]

II. THE 1987 MICHIGAN STATUTE IS NEITHER ARBITRARY NOR IRRATIONAL

In addition to proposing their new test for evaluating the constitutionality of retroactive legislation under the Due Process Clause, petitioners contend that the 1987 Michigan law is unconstitutional under the established standard. Pet. Br. 48-50. We disagree. The law furthers a legitimate legislative purpose in a rational way and therefore does not violate due process principles.

A. The 1987 Michigan Law Serves A Legitimate Legislative Purpose

The Michigan Supreme Court determined that the 1987 law served "a legitimate state interest." Pet. App. 17a. The court explained:

> It is significant that in the 1981 amendment, the resources saved as a result of coordination of benefits were reallocated to increase benefit levels generally. These increased levels, however, were only for injuries after January 1, 1982. The Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982. There was a legitimate state interest, therefore, in correcting this perceived inequity.

Ibid.

Petitioners object that the court "hypothesized" this rationale for the 1987 law. Pet. Br. 49. As an initial matter, under the Due Process Clauses "the existence of facts supporting the [Michigan law] is to be presumed," and the burden is on petitioners to adduce evidence that "preclude[s] the assumption that [the law] rests upon some rational basis within the knowledge and experience of the legislators." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); see also *Olsen* v. *Nebraska*, 313 U.S. 236, 246-247 (1941). In any event, it is evident that the Michigan legislature passed the 1987 law to eliminate the retroactive effect of the 1981 law, and the 1987 law plainly had the effect that the Michigan Supreme Court described. That is, all that the Michigan legislature did in 1987 was to remove the effects of the application of the 1981 law to injuries occurring before it took effect. Such a purpose—to retroactively eliminate the effects of the retroactive application of a prior law—is plainly rational; it certainly seems odd for petitioners to contend that negating the retroactive effect of a law is an irrational goal. In addition, as the Michigan Supreme Court emphasized, the fact that employees injured before 1982 did not share in the general increase in benefits provides an additional reason not to subject them to the coordination of benefits law.

Furthermore, the fact that the 1987 law responded to the decision in *Franks* does not render the law illegitimate. See Pet. Br. 45. Legislation is often prompted by judicial decisions, as shown by the 1984 amendments to the LHWCA discussed above. See pages 15-17, *supra*.[12]

---

[11] Furthermore, petitioners' proposed rules for due process review reverse the proper relationship between the constraints of the Due Process Clauses and those of the Contract Clause, Art. I, § 10, Cl. 1. Petitioners' rules impose much greater constraints on legislatures than are imposed under the Contract Clause analysis this Court has employed in modern decisions. See, *e.g.*, *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). The Framers of the Constitution, however, "explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause," electing instead to impose "less searching standards" under the Due Process Clause. *Gray*, 467 U.S. at 732 n.9, 733.

[12] Many times Congress has amended laws, sometimes with retroactive effect, in response to interpretations of prior law by this

The constitutionality of such legislation under the Due Process Clauses depends in each case on whether the law furthers a legitimate legislative purpose in a rational manner, not on whether the legislature acted in response to a judicial decision.

B. The 1987 Michigan Law Furthers Legislative Intent In A Rational Manner

Petitioners contend that the 1987 law does not *rationally* further a legitimate purpose because they consider the beneficiaries of the 1987 law to be "double-dippers," Pet. Br. 24, 26, 49, and the "least deserving" of assistance, *id.* at 25, 49. As an initial matter, arguments of this sort are more properly directed to legislatures rather than to courts. See, *e.g.*, *Turner Elkhorn*, 428 U.S. at 19 ("whether a broader cost-spreading scheme would have been wiser or more practical * * * is

---

Court. See generally Slawson, 48 Calif. L. Rev. at 244-246 & n.148. For example, the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 29 U.S.C. 251-262, amended the Fair Labor Standards Act of 1938 in response to this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, the Court had held that the statutory workweek for which employees must be paid included time spent on activities such as walking to and from their work stations and putting on and removing work clothing. *Id.* at 690-694. Responding to the complaints of employers suddenly exposed to large, unanticipated overtime claims, 29 U.S.C. 251(a), Congress abolished both employer liability and the jurisdiction of the courts to decide such claims, and made those changes applicable retroactively to actions seeking overtime pay for work performed before the statute was amended. 29 U.S.C. 252(a) and (d). Those provisions of the Portal-to-Portal Act were upheld against retroactivity challenges by nine circuit courts. See *Moss* v. *Hawaiian Dredging Co.*, 187 F.2d 442, 445 & n.3 (9th Cir. 1951) (collecting cases). See also *Temple Univ.* v. *United States*, 769 F.2d 126, 128, 133-135 (3d Cir. 1985) (upholding a statute reversing this Court's decision in *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), and making a change in tax law retroactive for five years), cert. denied, 476 U.S. 1182 (1986)).

not a question of constitutional dimension"); *Ferguson* v. *Skrupa*, 372 U.S. at 732; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955) (a "law need not be in every respect logically consistent with its aims to be constitutional" under the Due Process Clause). Moreover, even though they insist that the 1987 legislation should have "target[ed] its benefits to the entire class of persons" who were injured before 1982, Pet. Br. 49, it is hard to believe that petitioners would be satisfied with a law that applied the 1982 increase in workers' compensation benefits retroactively to all such employees. At bottom, petitioners merely quibble with the means the Michigan legislature used to equalize the impact of the changes that took effect in 1982. The legislature could have chosen to apply both the coordination of benefits law and the law increasing benefits levels retroactively to cover injuries that occurred before 1982, as petitioners suggest. But it instead decided in 1987 that neither law should be applied retroactively, so that the pre-1982 scheme (lower benefit levels, but no coordination of benefits) applied to injuries incurred before 1982, while the 1982 changes applied in a prospective manner only.

Petitioners also contend that the 1987 law unfairly upset expectations on which they were entitled to rely when they insured against the risk of injuries to their employees. Pet. Br. 18-19, 44. But petitioners could not have relied on the 1981 law authorizing coordination of benefits when they decided to self-insure with respect to injuries incurred before 1982.[13] Nor could other employers have relied on the coordination of benefits law when

---

[13] Michigan law permits larger, financially sound employers like petitioners to self-insure under certain conditions. Mich. Comp. Laws Ann. § 418.611 (West 1985 & Supp. 1991); Citizens Ins. Amicus Br. 5. In 1988, Michigan employers and insurance carriers paid over one billion dollars in workers' compensation and associated medical benefits. Of that total, 54% was paid by private insurance carriers, 39% was paid by self-insurers, and 7% was paid by state funds. Nelson, *Workers' Compensation: Coverage, Benefits, and Costs, 1988*, Soc. Sec. Bull. 12, 18 (March 1991).

they purchased insurance against the risk of injuries to employees injured before 1982. That is so because those decisions were made before the coordination of benefits law was enacted and, as is the case under most workers' compensation statutes, under Michigan law the identity of the employer or carrier liable for all future compensation benefits is fixed at the time of the employment-related injury. Mich. Comp. Laws Ann. §§ 418.435, 418.621(2)(a) (West 1985 & Supp. 1991); 4 A. Larson, *Workmen's Compensation Law* § 92.23 (1990); *Pennsylvania Nat'l Mut. Casualty Ins. Co.* v. *Spence*, 591 F.2d 985 (4th Cir.) (LHWCA), cert. denied, 444 U.S. 963 (1979). Moreover, the premiums for those policies (and the assumptions made by self-insurers) were established at the beginning of the policy periods, when the coordination provision did not yet exist. Citizens Ins. Co., et al. Amicus Br. [hereafter Citizens Ins. Amicus Br.] 6; see also 4 A. Larson, *Workmen's Compensation Law*, *supra*, § 92.65. Accordingly, the employees acted on the assumption that disability payments under those policies could not be coordinated. See Citizens Ins. Amicus Br. 7.

The coordination of benefits law therefore gave insurance companies and self-insuring employers like petitioners a windfall. The insurance companies had collected premiums based on the assumption that payments to those employees could not be coordinated; self-insuring employers must also have planned to pay uncoordinated benefits. The 1987 law did no more than require them to disgorge that windfall, a result that fully comports with due process. Cf. *Graham & Foster*, 282 U.S. at 426.

After the coordination of benefits provision was enacted, self-insuring employers and insurance carriers may have made investment and spending decisions based on the assumption that they would not be required to disgorge their windfall. But any detrimental reliance by the employers and the insurers does not suffice to render the 1987 law arbitrary and irrational. First, as the state court correctly found, the law regarding coordination of

benefits was in a state of flux until the Michigan Supreme Court decided *Franks* in 1985. See Pet. App. 12a. Prior to *Franks*, both the state court of appeals and the state agency responsible for workers' compensation had held that employers could not coordinate the benefits of workers injured before 1982; the Michigan House and Senate had passed resolutions to the same effect. *Id.* at 3a n.2, 60a; see also Pet. Br. 22 n.9. Only 16 months elapsed between the denial of rehearing in *Franks* and the enactment of the 1987 law, and the legislative proposals that led to the law were introduced within months after denial of rehearing. In short, there was at most only a brief period during which employers and carriers could have relied on application of the coordination of benefits provision to injuries that occurred before 1982.

Second, any detrimental reliance by petitioners is countervailed by the competing interests of employees injured before 1982. Just as employers expected at the time of injury to pay those employees uncoordinated benefits, the employees expected at that time to receive uncoordinated benefits. The employees undoubtedly made decisions—such as how much of a mortgage to assume—based on their expectations that they would receive uncoordinated benefits. It was reasonable for the Michigan legislature to decide in 1987 to put them back in the situation that applied to them prior to 1982.

CONCLUSION

If the Court reaches the due process issue, the judgment of the Michigan Supreme Court should be affirmed with respect to that issue.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

DAVID S. FORTNEY
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor

SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45058

Supreme Court, U.S.
FILED
JUL 11 1991
OFFICE OF THE CLERK

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, ***Petitioner***

v.

EVERT ROMEIN, ET AL., ***Respondents***

FORD MOTOR COMPANY, ***Petitioner***

v.

ARTURO GONZALEZ, ET AL., ***Respondents***

On Writ Of Certiorari
To The Supreme Court Of Michigan

BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

WILLIAM H. CRABTREE
Vice President and General Counsel
Motor Vehicle Manufacturers
Association of the United States, Inc.
7430 Second Avenue
Suite 300
Detroit, Michigan 48202

DWIGHT H. VINCENT
J. WALKER HENRY
RACHELLE G. SILBERBERG
Clark, Klein & Beaumont
1600 First Federal Building
Detroit, Michigan 48226

DAVID A. STRAUSS
Counsel of Record
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-9601

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Amici will address the following question:

Whether the Contract Clause of the Constitution should be interpreted according to its literal terms, as a strict prohibition against legislation impairing the obligation of contracts.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
THE CONTRACT CLAUSE SHOULD BE INTERPRETED TO PROHIBIT LEGISLATION THAT IMPAIRS CONTRACTUAL OBLIGATIONS IN ALL BUT THE MOST COMPELLING CIRCUMSTANCES	5
A. The Language And Structure Of The Constitution Require That The Contract Clause Be Interpreted As A Strict Prohibition Against Impairing The Obligations Of Contracts	5
B. The History Of The Drafting Of The Contract Clause Confirms That The Framers Intended The Clause To Be A Strict Prohibition	12
C. The Evolution Of Contract Clause Doctrine Shows That The Current Interpretation Is Unwarranted	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	PAGE
Adkins v. *Children's Hospital*, 261 U.S. 525 (1923)	22
Allgeyer v. *Louisiana*, 165 U.S. 578 (1897)	18
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978)	6, 8, 12, 13, 19
Barron v. *Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833)	9
Califano v. *Goldfarb*, 430 U.S. 199 (1977)	17
Chicago Bd. of Realtors v. *City of Chicago*, 819 F.2d 732 (7th Cir. 1987)	10
Coppage v. *Kansas*, 236 U.S. 1 (1915)	18
East New York Bank v. *Hahn*, 326 U.S. 230 (1945)	22
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983)	7, 8, 17
Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983)	5
Gelfert v. *National City Bank*, 313 U.S. 221 (1941)	22
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934)	19, 20, 21, 22
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)	8, 9, 10, 17
Lochner v. *New York*, 198 U.S. 45 (1905)	7, 18, 22
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935)	21
Miller v. *Florida*, 482 U.S. 423 (1987)	10
Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)	17
New York Times Co. v. *United States*, 403 U.S. 713 (1971)	20
Ogden v. *Saunders*, 25 U.S. (12 Wheat.) 213 (1827)	23

Stone v. *Mississippi*, 101 U.S. 814 (1880) 5
Treigle v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936) 21
United States v. *Lovett*, 328 U.S. 303 (1946) 10
United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 6, 8, 17, 18, 19, 22
Vanhorne's Lessee v. *Dorrance*, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795) 13
Veix v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) 7, 22
W.B. Worthen Co. v. *Kavanaugh*, 295 U.S. 56 (1935) 21
W.B. Worthen Co. v. *Thomas*, 292 U.S. 426 (1934) .. 21
Wood v. *Lovett*, 313 U.S. 362 (1941) 21

Constitutional Provisions:

U.S. Constitution,
Article I, § 9, Clause 2 10
Article I, § 10, Clause 1 ..... *passim*
Article I, § 10, Clause 3 10

Miscellaneous:

E. Corwin, *The Constitution and What It Means Today* (H. Chase & C. Ducat eds. 1973) ... 12
4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliott ed. 1881) 13
The Federalist (C. Rossiter ed. 1961) 12, 13, 16, 17
Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv. L. Rev. 852 (1944) 12

E. Johnson, *The Foundations of American Economic Freedom* (1973) 12
Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. Law & Econ. 467 (1976) 12
Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525 (1987) 11
H. Maine, *Popular Government* (1886) 19
McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267 (1988) 12, 13
Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597 (1987) 11
J. Nedelsky, *Private Property and the Limits of American Constitutionalism* (1990) 12
Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623 (1980) 11
Records of the Federal Convention of 1787 (Farrand ed. 1911) 14, 15, 16
B. Schwartz, *A Commentary on the Constitution of the United States* (1965) 11
Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95 ..... 12, 19
B. Wright, *The Contract Clause of the Constitution* (1938) 13, 14, 15, 19
5 *The Writings of James Madison* (G. Hunt ed. 1904) 13

No. 90-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, ***Petitioner***
v.
EVERT ROMEIN, ET AL., ***Respondents***

FORD MOTOR COMPANY, ***Petitioner***
v.
ARTURO GONZALEZ, ET AL., ***Respondents***

On Writ Of Certiorari
To The Supreme Court Of Michigan

BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AND THE MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICI CURIAE

The Motor Vehicle Manufacturers Association of the United States, Inc., (MVMA) is a nonprofit membership association composed of companies engaged in the manufacture of motor vehicles in the United States. The members of MVMA are Chrysler Corporation, Ford Motor Company, General Motors Corporation, Honda of America Manufacturing, Inc., Navistar International Transportation Corp., PACCAR, Inc., and Volvo North America Corporation. The Michigan Manufacturers Association (MMA)

is an association composed of 2,665 private Michigan employers. It is organized to study matters of general interest to its members, to promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and otherwise to promote the general business and economic welfare of the State of Michigan. Both MVMA and MMA have often represented the interests of their member companies in administrative and judicial proceedings.

This case presents important questions concerning the power of state governments retroactively to alter the obligations of employment contracts and, by extension, all contracts. MVMA's member companies employ over 715,000 workers in the United States. MMA's members employ over 1,000,000 workers in a variety of industries. Amici therefore have a strong interest not only in the outcome of this case but in the effect that the Court's decision in this case will have on the future development of the law governing states' power retroactively to impair contractual obligations.[1]

SUMMARY OF ARGUMENT

A. As currently interpreted, the Contract Clause imposes only limited restraints on state governments. Michigan's 1987 amendment to its workers' compensation laws is irreconcilable even with the current Contract Clause standards; indeed, the 1987 amendment is in many respects a core example of a violation of the Contract Clause. This case, however, also furnishes the Court an opportunity

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

to establish that current Contract Clause standards have eroded too far, and that the Clause should be interpreted more strictly, according to its language and the original understanding.

The language of the Contract Clause is unequivocal: "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." The Contract Clause appears in the provision of the Constitution (Art. I, § 10, Cl. 1) that contains the most fundamental restrictions on the powers of the states found in the pre-Civil War Constitution. Within that provision, the Contract Clause is conjoined with the Ex Post Facto Clause and the Bill of Attainder Clause—two fundamental guarantees of the rule of law. For the first 150 years of the Republic, the Clause was interpreted strictly, in accordance with its terms. That strict enforcement is generally recognized to have been highly beneficial to the Nation's economy.

Under current law, however, many abrogations of contract rights are not deemed "impairments." Moreover, contrary to the explicit language of the Clause, even an acknowledged impairment will be upheld if it satisfies open-ended criteria of "reasonableness" and "appropriateness" and if the state interest outweighs the "severity of the impairment." Such a lenient interpretation of an explicit, unequivocal constitutional command has never been adequately justified.

B. The history of the drafting of the Contract Clause shows that the Framers intended it to be interpreted strictly. Indeed, in the debates at the Convention and elsewhere, opponents of the Contract Clause offered precisely the arguments that are now advanced for interpreting the Clause "flexibly." The Framers rejected those arguments and wrote a Clause phrased in unequivocal terms.

Moreover, the history of the Clause shows that the Framers did not see it simply as a protection of property rights. Instead, they believed that the Contract Clause, like the Ex Post Facto Clause, reflected a fundamental requirement of fairness between the government and its citizens.

C. The evolution of Contract Clause doctrine shows that the current standards are not the result of a considered judgment by the Court that strict enforcement of the Clause would be harmful or unworkable. Instead, the erosion of the Contract Clause is the result of an unreflective series of decisions that, wholly unjustifiably, associated the Contract Clause with the utterly different notion of economic substantive due process. Properly understood, the Contract Clause is in no sense a general barrier to state regulation, any more than the Ex Post Facto Clause is a general barrier to state criminal law enforcement. Rather, the Contract Clause is an unequivocal constitutional guarantee, rooted in values of fairness and stability, that should be interpreted in accordance with its language and intent.

ARGUMENT

THE CONTRACT CLAUSE SHOULD BE INTERPRETED TO PROHIBIT LEGISLATION THAT IMPAIRS CONTRACTUAL OBLIGATIONS IN ALL BUT THE MOST COMPELLING CIRCUMSTANCES.

A. The Language And Structure Of The Constitution Require That The Contract Clause Be Interpreted As A Strict Prohibition Against Impairing The Obligations Of Contracts.

As currently interpreted, the Contract Clause imposes only limited restraints on the power of state governments. Amici agree with petitioners that Michigan's 1987 amendment to its workers' compensation laws transgresses even those limits. Indeed, in many respects the 1987 amendment is a paradigm example of legislation that violates the Contract Clause. The 1987 amendment is not a general police power regulation that happens to have an incidental effect on settled obligations. Compare *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 191 (1983) (upholding a measure affecting contract rights on the ground that it "applied to all oil and gas producers, regardless of whether they happened to be parties to . . . contracts"); *Stone* v. *Mississippi*, 101 U.S. 814 (1880) (upholding a state constitutional provision that incidentally invalidated already-issued lottery tickets, in the course of prohibiting all lotteries). Rather, the 1987 amendment is legislation targeted specifically on settled obligations; as Justice Griffin noted in his opinion below, it was "deliberately designed to disrupt retroactively past transactions" (Pet. App. 50a). The state's only justification for the 1987 amendment is simply that the state thought it would be advantageous to readjust contractual rights retroactively. And the 1987 amendment is designed to benefit a narrow group, not the public generally. A statute of this kind—narrow legislation designed specifically to disrupt contractual expectations solely be-

cause the state seeks to capture some political advantage by doing so—constitutes a core violation of the Contract Clause.

As associations of manufacturers with large numbers of employees and extensive commercial dealings, however, amici are concerned not just about this case but about the larger picture as well. Although the judgment of the Michigan Supreme Court should be reversed even under current Contract Clause standards, this case provides the Court with an occasion to consider whether those standards should be revised.

The Contract Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). During the last half-century, however, this Court has invalidated only two statutes (and only one statute regulating contracts between private parties) under the Contract Clause. *Allied Structural Steel, supra*; *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

This dramatic erosion of the Contract Clause has never been adequately justified. The text of the Contract Clause is unequivocal. Nothing in the history of the framing of the Clause suggests that the needs that animated it have disappeared; on the contrary, the Framers anticipated, and were not persuaded by, the very arguments that have today been accepted as reasons for relaxing the limits that the Clause imposes on the states.

Ultimately, Contract Clause doctrine today appears to be the product of the unreflective association of the Contract Clause with the discredited notion of economic substantive due process, a notion that led to the invalidation of much state regulatory legislation in the first third of

this century. See, *e.g.*, *Lochner* v. *New York*, 198 U.S. 45 (1905). As we explain below, this association is unwarranted, and there is no reason why the Contract Clause should not be applied today in the terms in which it was written—as a strict rule that contractual obligations are not to be impaired, at least absent the most compelling circumstances. Amici therefore suggest that the Court take this opportunity to establish that the Contract Clause should be interpreted in accordance with its language and history.

1. The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Under current doctrine, however, even a state law that explicitly abrogates contractual rights may not qualify as an "impairment" within the meaning of the Contract Clause. In particular, states have been allowed great latitude to alter the contractual obligations of any firm in a "heavily regulated industry." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983), citing *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940). In a period when regulation was the exception rather than the rule, this limitation on the Contract Clause might have been appropriate. But today there are few industries that are not heavily regulated in many respects, ranging from the securities they issue to conditions on the workplace floor, from the safety of the products they produce to their employees' pensions. Thus even this threshold limitation has the effect of severely reducing the coverage of the Contract Clause.

Once an "impairment" is found, the Contract Clause is unequivocal in its terms: it flatly forbids "any . . . Law impairing the Obligation of Contracts." Notwithstanding this explicit language, under current doctrine an acknowledged "impairment" of contractual obligations can be up-

held with such ease that this Court has found it necessary to caution that the Contract Clause "is not a dead letter." *Allied Structural Steel*, 438 U.S. at 241.

In determining whether an impairment is justified, current doctrine requires that the legislation satisfy three conditions: It must promote "a significant and legitimate public purpose"; it must be " 'based upon reasonable conditions' "; and it must have " 'a character appropriate to the public purpose.' " *Energy Reserves Group*, 459 U.S. at 411-12, quoting *United States Trust Co.*, 431 U.S. at 22 (brackets omitted). These standards are unjustifiably flexible. It is all too easy for litigants to adduce some "significant and legitimate public purpose" that legislation supposedly serves. Similarly, the requirements of "reasonableness" and "appropriateness" are highly open-ended.

Moreover, some of the Court's decisions have suggested that in applying these criteria, the courts should adopt a balancing test under which "[t]he severity of the impairment" will determine "the level of scrutiny to which the legislation is subjected." *Energy Reserves Group*, 459 U.S. at 411. Finally, even in applying these lenient standards, the courts are to be "defer[ential] to [the] legislative judgment" in cases (like the instant case) in which the contract is between private parties, rather than between a private party and the state. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987).

2. The text and structure of the Constitution alone reveal how problematic this interpretation of the Contract Clause is. The Contract Clause appears in Article I, Section 10, Clause 1 of the Constitution, which, in its entirety, provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Until the Fourteenth Amendment was adopted, this provision was "the primary constitutional check on state legislative power" (*Keystone Bituminous Coal Ass'n*, 480 U.S. at 502). Even the provisions of the Bill of Rights, of course, applied only to the federal government. *Barron* v. *Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The provisions of Art. I, § 10, Cl. 1 were, therefore, the restrictions that the Framers of the Constitution thought were the most fundamental and important limitations to impose on the states.

The importance of the other restrictions in Art. I, § 10, Cl. 1, is self-evident. The first two restrictions—on entering into treaties and issuing letters of marque and reprisal (which in effect is the power to initiate hostilities)—secure the power of the federal government to conduct foreign relations. The next three prohibitions in Clause 1—against coining money or issuing currency—are the domestic equivalent: they establish that national economic policy will be set by the federal government. The prohibitions against bills of attainder and ex post facto laws—prohibitions that are specifically joined with the Contract Clause—reflect the basic requirements of fair play and the rule of law between the government and citizens.

One would expect that prohibitions so central to the constitutional scheme would be strictly enforced according to their terms. No one would suggest that a state may enact an ex post facto law or a bill of attainder if such a law

is "reasonable" and "appropriate" and promotes "a legitimate public purpose." See, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423 (1987); *United States* v. *Lovett*, 328 U.S. 303 (1946). No one would suggest that the courts should defer to a state legislature's judgment in determining whether a state may issue paper currency or conduct foreign relations. Only the Contract Clause "is not to be read literally." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502.

3. When the Framers wanted to place only a qualified restriction on the power of the states, as opposed to the absolute restrictions of Art. I, § 10, Cl. 1, they of course knew how to do so. The very next clause of the Constitution provides that no state may "lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection Laws*." Clause 3 of Art. I, § 10 also contains a qualified limit on the power of the states: it provides that "[n]o State shall, without the consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*." Clause 2 of Art. I, § 9 prohibits the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." But Clause 1 of Art. I, § 10 is unqualified. See also *Chicago Bd. of Realtors* v. *City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner, J., concurring): "Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it now interprets the contract clause."

Of course, like any constitutional provision, the Contract Clause is subject to interpretation. There will be instances in which reasonable people can differ over whether a particular measure constitutes a "Law impairing the Obligation of Contracts," just as there can be reasonable disagreements over whether a particular measure constitutes an ex post facto law or a bill of attainder. But the deferential approach that current law takes to the Contract Clause is simply not warranted for a constitutional guarantee that is so unequivocal, and that occupies such an important structural position in the Constitution.

4. Perhaps for this reason, commentary on the Contract Clause has been virtually unanimous in criticizing the current standard and urging a more strict interpretation of the Clause. A consistent theme among the commentators is that many recent decisions—unlike the Contract Clause cases of the last century—do not treat the Clause with the rigor that is appropriate for a specific constitutional provision that is phrased in absolute terms and that is linked with such fundamental guarantees as the Ex Post Facto and Bill of Attainder Clauses. See, *e.g.*, Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597, 629 (1987) ("We are all familiar with . . . constitutional law evolving into something [different from what] was perhaps originally conceived. But . . . [i]t is quite another [thing] to contemplate a judicial doctrine which has moved 180 degrees from both the original understanding and the first 150 years of our constitutional history"); II B. Schwartz, *A Commentary on the Constitution of the United States* 306 (1965); Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1627 (1980) (footnote omitted) ("[i]nterpretation of the clause [has] bec[o]me virtually independent of intent and text"); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 545 (1987) ("The present Court's jurisprudence is at odds with the Framers' interest in providing certainty to those who

enter into contracts, because in evaluating the constitutionality of an impairment the Court has adopted widely differing standards of review and [has] balanced the extent of the impairment against the policy that the state seeks to advance"). See also Hale, *The Supreme Court and the Contract Clause: III*, 57 Harv. L. Rev. 852, 890-91 (1944), quoted in *Allied Structural Steel*, 438 U.S. at 241 n.12; E. Corwin, *The Constitution and What It Means Today* 105 (H. Chase & C. Ducat eds. 1973).

B. The History Of The Drafting Of The Contract Clause Confirms That The Framers Intended The Clause To Be A Strict Prohibition.

1. The history of the Contract Clause confirms what the text and structure of the Constitution reveal. It is a commonplace that the Framers attached great importance to the protection of property rights.[2] In *Federalist* No. 10, perhaps the most important of the *Federalist* papers, Madison stated that "the protection of [the] faculties of acquiring property" is "the first object of government." *Federalist* No. 10 (Madison), at 78 (C. Rossiter ed. 1961). Madison particularly feared the threat to property resulting from "[t]he mutability of the laws of the States." The "injustice" and "evils issuing from" frequent changes in state laws, Madison wrote to Jefferson, "contributed

[2] See, *e.g.*, Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 120; McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 270 (1988); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. Law & Econ. 467, 469-70 (1976); E. Johnson, *The Foundations of American Economic Freedom* 191-92 (1973); J. Nedelsky, *Private Property and the Limits of American Constitutionalism* chs. 2, 5 (1990).

more to the uneasiness which produced the [Constitutional] Convention" than any other inadequacy of the Articles of Confederation. 5 *The Writings of James Madison* 27 (letter of Oct. 24, 1787) (G. Hunt ed. 1904).

The Contract Clause "reflect[s] the high value the Framers placed on the protection of private contracts." *Allied Structural Steel*, 438 U.S. at 245. The Framers viewed the Contract Clause, together with the prohibition against bills of attainder and ex post facto laws, as the "constitutional bulwark in favor of personal security and private rights." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). "The sober people of America," Madison explained, "are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." *Ibid.*

Charles Pinckney regarded the Contract Clause and the other limitations of Art. I, § 10, Cl. 1 as "the soul of the Constitution." 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 333 (J. Elliott ed. 1881), quoted in McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 284 (1988). Justice William Patterson, who had been "an influential member of the Federal Convention" (B. Wright, *The Contract Clause of the Constitution* 20 (1938)) wrote an opinion in an early, important case invalidating a state statute under the Contract Clause and explained: "The preservation of property . . . is a primary object of the social compact." *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C. Pa. 1795). Roger

Sherman, a member of the Convention from Connecticut, explained to the Governor of Connecticut that the Contract Clause was "necessary as a security to commerce." 3 *Records of the Federal Convention of 1787*, at 100 (Farrand ed. 1911) (hereinafter "Farrand") (letter coauthored by Oliver Ellsworth). And Alexander Hamilton, in another remark typical of the Framers, commented that a law rescinding a state's obligations "may be safely said to be a contravention of the first principles of natural justice and social policy." B. Wright, *supra*, at 22 (citation omitted).

2. Participants in the Philadelphia Convention and in the state ratifying conventions objected to the proposed Contract Clause precisely on the grounds that are today advanced as reasons for interpreting the Contract Clause less than literally. The Framers rejected those arguments and adopted the Contract Clause—which they deliberately phrased as unequivocally as the other provisions of Art. I, § 10, Cl. 1. Moreover, the debates that led to the adoption of the Contract Clause show that the Framers did not see the Clause as simply a way to protect property rights. They believed the Clause was important for an even more fundamental reason: like the Ex Post Facto Clause, it was central to preserving the rule of law and protecting against fundamental unfairness.

a. The first motion to add the Contract Clause to the Constitution was made by Rufus King. 2 Farrand at 439. The motion was opposed by those who believed it would unduly restrict the ability of the states to respond to economic exigencies. See *id.* at 439-40. For example, Gouverneur Morris remarked that King's proposal "would be going too far. There are a thousand laws relating to bringing actions—limitations of actions & which affect contracts." *Id.* at 439. George Mason, anticipating the very language of today's proponents of a "flexible" Contract

Clause, objected: "Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential." *Id.* at 440. During the subsequent ratification debates, Luther Martin attacked the Contract Clause on the ground that "there might be times of such great public calamities and distress . . . as should render it the duty of a government" to interfere with contractual obligations, by "totally or partially stopping the courts" if necessary. 3 Farrand at 214-15 (emphasis omitted).

Madison's statement in the Convention reflected the position that ultimately prevailed: although "inconveniences might arise" from the absolute prohibition against impairing contractual obligations, Madison said, "on the whole [the inconveniences] would be overbalanced by the utility of" the prohibition. 2 Farrand at 440. The turning point of the debate occurred when James Wilson pointed out that, under the proposed Contract Clause, "*retrospective* interferences only are to be prohibited." *Ibid.* (emphasis in original).

In response to Wilson's suggestion, Madison and Edward Rutledge proposed that the purposes of the Contract Clause could be accomplished simply by applying the Ex Post Facto Clause—which, at that point, was drafted to apply only to the federal government—to the states. See 2 Farrand at 440. Rutledge proposed a substitute for King's motion that would prohibit the states from adopting ex post facto laws. That motion carried without further debate. *Ibid.*[3]

[3] Madison's notes reported that Rutledge's motion used the term "retrospective" laws, but according to the Journal of the Convention, which is apparently more accurate on this point, the term was "ex post facto." See B. Wright, *supra*, at 9 n.16.

The next day, John Dickinson reported that, according to Blackstone, "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." 2 Farrand at 448-49. The matter was referred to the Committee on Style, which ultimately reported the Contract Clause in its current form. The Clause was adopted without further reported debate. *Id.* at 619.

These events show that the Framers specifically contemplated that "inconveniences might arise" if the Contract Clause were added to the Constitution. They were urged not to adopt the Contract Clause precisely because it "would be going too far" and because "[c]ases will happen . . . where some kind of interference will be proper, & essential." Despite these arguments the Framers determined to adopt the Contract Clause. Moreover, they regarded the Contract Clause as no less absolute than the Ex Post Facto Clause.

b. The debates also show that the Framers viewed the Contract Clause as protecting the same values that are secured by the Ex Post Facto Clause—which is universally recognized not just as an unequivocal constitutional guarantee but as an essential component of the rule of law. As Madison explained: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). Elbridge Gerry sought to apply the Contract Clause to the federal government precisely because preserving contractual obligations was a matter of "public faith." 2 Farrand at 619. And Hamilton summarized the views of many when he stated that laws impairing the obligation of contract are "atro-

cious breaches of moral obligation and social justice." *Federalist* No. 7 (Hamilton), at 65 (C. Rossiter ed. 1961). The Framers did not regard the Contract Clause as merely a matter of " 'economic and social regulation' " (*Energy Reserves Group*, 459 U.S. at 412-13 (citation omitted))—a realm in which flexibility might be appropriate. Instead, they conceived the Contract Clause to be a guarantee of fundamental fairness and the rule of law.

C. The Evolution Of Contract Clause Doctrine Shows That The Current Interpretation Is Unwarranted.

The current state of Contract Clause doctrine is not the result of a considered judgment by the Court that strict enforcement of the Clause will produce harmful results or will otherwise be unworkable. On the contrary, the period during which the Clause was strictly enforced is generally viewed as one in which the economy greatly profited from the stability that the Contract Clause provided. The Contract Clause has evolved to its current state because of a mistaken association between the Clause and a wholly different conception, the notion of economic substantive due process.

For example, the Court has said that in deciding issues under the Contract Clause, courts should "defer to legislative judgment" as "is customary in reviewing economic and social regulation." *United States Trust Co.*, 431 U.S. at 22-23; see also *Energy Reserves Group*, 459 U.S. at 413; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 505. But there is, of course, no uniform standard for reviewing "economic and social regulation." Economic and social regulation that discriminates against suspect groups or threatens First Amendment rights is strictly scrutinized. See, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Califano* v.

Goldfarb, 430 U.S. 199 (1977). Similarly, if legislation violates the plain terms of the Contract Clause, it should not be entitled to deference.

The Court's suggestion that a deferential standard of review generally applies in the area of "economic and social regulation" does, however, help explain how the Contract Clause has evolved to its current state. The Court's insistence on "deference" in this area shows an understandable concern that the notion of economic substantive due process not again be used to strike down legislation on the basis of questionable economic theories nowhere found in the Constitution. That now-discredited notion was used most aggressively in the period from approximately the 1890s to the 1930s as a basis for invalidating much regulatory and social welfare legislation. See, *e.g.*, *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897); *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915).

The current state of Contract Clause doctrine can be traced to a series of decisions rendered immediately after the demise of economic due process. Those decisions unreflectively treated the Contract Clause and economic due process as aspects of the same bundle of outmoded ideas. They discarded the Contract Clause because economic due process had been discredited. Indeed, the supposed connection between the Contract Clause and economic due process was a theme of the dissent from one of the two decisions in the last half-century in which the Court has invalidated legislation under the Contract Clause. *United States Trust Co.*, 431 U.S. at 60-62 (Brennan, J., dissenting).

The association between the Contract Clause and economic due process is, however, unwarranted. Although both the Contract Clause and economic substantive due

process have something to do with economic and commercial affairs, the Contract Clause differs from economic due process in its scope, its theoretical underpinnings, its effect on the power of states to govern, and, of course, its textual basis in the Constitution.

1. For the first century of the Republic, the Contract Clause "was far more frequently before the Court than any other clause of the Constitution, excepting only the commerce clause." B. Wright, *supra*, at 91-92. See *Allied Structural Steel*, 438 U.S. at 241. The Contract Clause was the primary means by which the Court—dominated for much of this time by Chief Justice Marshall—fostered the development of the emerging American economy. See B. Wright, *supra*, at 28-29; Schwartz, *supra*, 1979 Sup. Ct. Rev. at 98.

The Clause continued to be important during the Taney, Chase, and Waite Courts. See B. Wright, *supra*, at 62-95. Writing near the end of this period, Sir Henry Maine asserted that "in point of fact there is no more important provision in the whole Constitution." He explained that the principle of the Contract Clause "has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American Continent has been performed." H. Maine, *Popular Government* 247-48 (1886), quoted in Schwartz, *supra*, 1979 Sup. Ct. Rev. at 97.

2. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), is "the leading case in the modern era of Contract Clause interpretation." *United States Trust Co.*, 431 U.S. at 15. The Court in *Blaisdell* upheld a Minnesota statute that permitted courts to postpone mortgage foreclosure sales of homes and to extend the period of redemption. The reasoning of *Blaisdell* is in many ways

responsible for the modern, lenient interpretation of the Contract Clause. For example, the *Blaisdell* Court explicitly disregarded the plain language of the Contract Clause (290 U.S. at 428), deemed the conjunction of the Contract Clause with the Ex Post Facto and Bill of Attainder Clauses to be irrelevant (*id.* at 426-27), and declared that the history of the Clause was "of little aid" (*id.* at 427).

The *Blaisdell* Court, however, never intended to eviscerate the Contract Clause in the way that subsequent courts believed *Blaisdell* to have done. The Minnesota moratorium was enacted in April 1933, at the depths of the Depression, and the Court in *Blaisdell* emphasized the emergency nature of the legislation. *Id.* at 425, 439-40, 444-45. In addition, the Minnesota statute was, by its terms, to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935" (*id.* at 416) and the Court emphasized that the statute was only a "limited and temporary interposition[ ]" that granted only "temporary relief" from a contractual obligation through a "temporary and conditional restraint." *Id.* at 439-40.

Whatever the soundness of allowing a limited exception to the Contract Clause for temporary measures enacted in genuine emergencies—cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (suggesting that even a prior restraint of political expression might be permitted in cases of "direct, immediate, and irreparable damage")—that is not the same thing as an interpretation of the Clause that would permit an impairment of a contractual obligation whenever a state acts in pursuit of a "significant and legitimate public purpose" by means that can be deemed "reasonable" and "appropriate." Certainly the *Blaisdell* Court did not understand

that decision to have had a dramatic impact on the Contract Clause. A mere four months after *Blaisdell*, in *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934), the Court invalidated an Arkansas law under the Contract Clause. Chief Justice Hughes, who wrote the opinion for the Court in *Blaisdell*, wrote the opinion for the Court in *Thomas* as well; he explained that the Arkansas law, unlike the statute upheld in *Blaisdell*, was not intended to deal with an emergency and was "neither temporary nor conditional." *Id.* at 433-34.

A year later, the Court invalidated another Arkansas statute under the Contract Clause. *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935). Justice Cardozo, a member of the *Blaisdell* majority, wrote the opinion for the Court in *Kavanaugh* and distinguished *Blaisdell* on the same ground: that the statute at issue in *Blaisdell* was carefully limited in duration and in its effects on creditors' rights. *Id.* at 63. See also *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 597-98 (1935) (Brandeis, J.) (invalidating a provision of the federal Bankruptcy Act on retroactivity grounds and distinguishing *Blaisdell*). In *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936), the Court unanimously invalidated a Louisiana statute on Contract Clause grounds and did not even consider it necessary to discuss *Blaisdell*; the Court merely cited *Blaisdell* for the well-established proposition that "the obligations of contracts must yield to a proper exercise of the police power" (*id.* at 197). Finally, in *Wood* v. *Lovett*, 313 U.S. 362 (1941), the Court invalidated a state law, enacted after the sale of state lands, that adversely affected title to the lands.

Thus, as late as 1941, seven years after *Blaisdell*, the Court still enforced the Contract Clause rigorously against state legislation. The *Blaisdell* Court itself did not con-

sider *Blaisdell* to have reduced the Contract Clause to an open-ended balancing test.

3. The lenient modern approach to the Contract Clause, therefore, was not the result of a deliberate decision by the Court to turn sharply away from strict enforcement of the Clause. Instead, the modern view developed in a series of decisions that ignored the limited nature of the holding (as opposed to the dicta) in *Blaisdell* and that did not seriously attempt to explain why dramatically less vigorous enforcement of the Contract Clause was needed. Instead, these decisions casually assimilated the Contract Clause to the doctrine of economic due process and treated the Contract Clause as a relic of a bygone era. See, *e.g.*, *Veix*, 310 U.S. at 41 ("[c]ertainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power"); *Gelfert* v. *National City Bank*, 313 U.S. 221, 235 (1941) ("[w]e cannot . . . force legislatures to be blind to the lessons which [this] century has taught"); *East New York Bank* v. *Hahn*, 326 U.S. 230, 231-33 (1945). See also *United States Trust Co.*, 431 U.S. at 60-62 (Brennan, J., dissenting).

This conception of the Contract Clause, which treats it as part and parcel of the economic due process era, to be swept away with the demise of that era, cannot be justified. Properly understood, the Contract Clause has little in common with economic due process. That notion was used to promote what was called "freedom of contract." Under this rubric the Court invalidated, for example, maximum hour and minimum wage legislation. *Lochner* v. *New York*, *supra*; *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). The theory of these decisions was that such legislation unreasonably interfered with the freedom of employees to sell their labor on the terms they chose. This

notion of freedom of contract had, of course, a devastating effect on regulatory legislation.

The Contract Clause was never used to invalidate legislation on this basis. The Contract Clause applies only to *retrospective* legislation—legislation that interfered with contracts already made. It was never used to invalidate legislation that "interfered" with the ability to enter into contracts in the future. This point was settled in *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213 (1827), where the Court explained that the Contract Clause, like the Bill of Attainder and Ex Post Facto Clauses, was designed to protect the rule of law, not broadly to interfere with state legislation. The three Clauses, Justice Johnson said, were "a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property." *Id.* at 286. Justice Trimble, in a concurring opinion, noted that any other interpretation of the Contract Clause would "transform a special limitation upon the general powers of the States into a general restriction." *Id.* at 322.

The Contract Clause, therefore, is properly understood as a provision comparable to the Ex Post Facto Clause. Like the Ex Post Facto Clause, it leaves ample legislative flexibility to the states. It rests on the core values of the rule of law, not on a highly disputable economic theory. And the Contract Clause, unlike the notion of economic due process, is an explicit and unequivocal constitutional command.

The regime of economic due process and "freedom of contract" interpreted the Due Process Clause in a way that bore no relation to its meaning, history, or structural position in the Constitution. In this respect, the true successor to economic due process today is the overly flexible interpretation of the Contract Clause—not the interpreta-

tion we propose, which would carry out the plain language and the Framers' intentions. Because the current state of Contract Clause doctrine is based on an unreflective and unjustifiable view of the Clause, and because that doctrine is inconsistent with the plain meaning and the history of the Contract Clause, the Court should reconsider the doctrine and restore the Contract Clause to the status it held, with beneficial consequences, for 150 years of the nation's history.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

WILLIAM H. CRABTREE
Vice President and General Counsel
Motor Vehicle Manufacturers
Association of the United States, Inc.
7430 Second Avenue
Suite 300
Detroit, Michigan 48202

DAVID A. STRAUSS
Counsel of Record
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-9601

DWIGHT H. VINCENT
J. WALKER HENRY
RACHELLE G. SILBERBERG
Clark, Klein & Beaumont
1600 First Federal Building
Detroit, Michigan 48226

JULY 1991

(12)

No. 90-1390

FILED
JUL 11 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, ET AL.,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, ET AL.,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICI CURIAE* CITIZENS INSURANCE COMPANY OF AMERICA, MICHIGAN MUTUAL INSURANCE COMPANY, MICHIGAN ASSOCIATION OF INSURANCE COMPANIES, ALLIANCE OF AMERICAN INSURERS AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY AND URGING REVERSAL OF THE MICHIGAN SUPREME COURT

DONALD S. YOUNG
Counsel of Record
Dykema Gossett
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560
Attorney for *Amici Curiae*
Of Counsel
KATHLEEN MCCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the 1987 amendment to the Michigan Worker's Disability Compensation Act, which retroactively imposes on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds long after the insurers fully had discharged their policy obligations under applicable law, violate the Contract Clause (art. I, § 10) of the United States Constitution?

2. Does the 1987 Michigan statute retroactively imposing on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds after the insurers fully had discharged their policy obligations under applicable law, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

The Amici Curiae Or Their Members Provide Workers Compensation Insurance In Michigan ... 1

The Pricing Of Worker's Compensation Insurance In Michigan Is Prospective Only 4

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE CONTRACT CLAUSE BARS THE MICHIGAN LEGISLATURE FROM RETROACTIVELY IMPOSING ON INSURERS ADDITIONAL LIABILITIES TO THEIR INSUREDS LONG AFTER THE INSURERS FULLY HAD DISCHARGED THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING LAW 9

A. Express Contractual Rights Of Insurers Under Michigan Worker's Compensation Policies Are Protected By The Contract Clause 10

B. The Impairment Of Insurers' Express Contracts With Their Insureds Violates The Contract Clause 12

1. The 1987 statute substantially impairs contract rights 12

2. The Michigan court misapplied this Court's holdings on the "legitimate purpose" and "reasonable means" requirements in Contract Clause cases 15

TABLE OF CONTENTS – Continued

Page

II. THE 1987 LEGISLATION VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IMPERMISSIBLY DISTURBS THE SETTLED EXPECTATIONS OF THE PARTIES TO WORKER'S COMPENSATION INSURANCE CONTRACTS AND IS MANIFESTLY UNFAIR TO INSURERS 18

CONCLUSION 22

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 12, 13, 14, 16, 17

Chambers v. General Motors Corp., 422 Mich. 636, 375 N.W.2d 715 (1985) 11, 21

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 12

Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) 12

Romein v. General Motors Corp., 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990) 1, 3, 14, 15, 16, 18

STATUTES:

Mich. Comp. Laws Ann. § 418.352 (West 1990) ... 16, 17

Mich. Comp. Laws Ann. § 418.354 (West 1990) .. *passim*

Mich. Comp. Laws Ann. § 418.611 (West 1990) 5

Mich. Comp. Laws Ann. § 500.2301 (West 1983) 5

Mich. Comp. Laws Ann. § 500.2403 (West 1990) 21

Mich. Comp. Laws Ann. § 500.3101 – § 500.3179 (West 1990) 20

OTHER AUTHORITY:

Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1) (1980) 6, 21

Amici Curiae Citizens Insurance Company of America, Michigan Mutual Insurance Company, Michigan Association of Insurance Companies, Alliance of American Insurers and American Insurance Association (collectively "*Amici Curiae*" or "*Amici*") submit this Brief in Support of General Motors Corporation and Ford Motor Company and urge this Court to reverse the decision of the Michigan Supreme Court in this case.[1]

INTEREST OF THE *AMICI CURIAE*[2]

The Amici Curiae Or Their Members Provide Workers Compensation Insurance In Michigan.

Amici Curiae Citizens Insurance Company of America ("Citizens") and Michigan Mutual Insurance Company ("Michigan Mutual") are insurers providing, *inter alia*, worker's compensation and employer's liability insurance to employers in Michigan that are required by law to secure the payment of benefits to their employees who are injured on the job. Citizens and Michigan Mutual are directly affected by the Michigan legislature's 1987 amendment to § 354 of the Worker's Disability Compensation Act, Mich. Comp. Laws Ann. § 418.354 (West 1990), which retroactively imposed liability on Citizens and Michigan Mutual for the payment of additional worker's compensation benefits on behalf of their insureds years

[1] *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

[2] *Amici* have filed with the Court Clerk Petitioners' and Respondents' written consents to the filing of this Brief.

after these insurers had fully discharged their contractual duties to the insureds.[3] If this Court affirms the Michigan Supreme Court's decision finding the 1987 amendment constitutional, Citizens and Michigan Mutual will be required to expend between them approximately $2.3 million to satisfy their newly created obligation to pay additional worker's compensation benefits on behalf of past and present insureds.

Amici Curiae Michigan Association of Insurance Companies ("MAIC"), Alliance of American Insurers ("AAI") and American Insurance Association ("AIA") are insurance industry trade organizations whose members include insurers that sell, among other lines of insurance, worker's compensation and employer's liability coverages in Michigan. The MAIC was organized in 1971 and the AAI was organized in 1922. The AIA has existed in its present form since 1964, although its roots reach as far back as 1866 with the founding of the National Board of Fire Underwriters, and 1926 with the founding of the Association of Casualty and Surety Companies. Each of these organizations was formed to promote the interests of its member insurers and to achieve this objective by

---

[3] The 1987 amendment, effective May 14, 1987, eliminated an offset provision in the worker's compensation act enacted in 1981 and in effect since March 31, 1982. The 1981 act permitted insurers and self-insured employers to coordinate worker's compensation benefits received by employees injured prior to January 1, 1982 with social security and other pension benefits these workers received. Additionally, the 1987 statute required insurers and employers to reopen claims that were paid between March 31, 1982 and May 14, 1987 to workers injured before 1982 and to pay workers, with interest, amounts coordinated pursuant to the 1981 statute.

representing the members in litigation and before legislative bodies, and by providing research and public information. Members of these organizations are directly affected, in the same manner as Citizens and Michigan Mutual, by the 1987 amendment to § 354 and by the state supreme court's decision in *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

The Contract Clause and Due Process Clause arguments raised by General Motors Corporation and Ford Motor Company apply with equal force to insurers like Citizens, Michigan Mutual and the members of MAIC, AAI and AIA. Michigan worker's compensation insurers fully satisfied their express contractual obligations to their insureds during the period from March 31, 1982 (the date insurers first were allowed to coordinate worker's compensation benefits with other retirement benefits) through May 14, 1987 (the effective date of the 1987 amendment requiring insurers to pay additional benefits, retroactive to March 31, 1982, to workers injured before that date). The Michigan legislature's attempt to impose greater liabilities on insurers than they assumed and discharged under their contracts during the relevant period works a direct and unconstitutional impairment of insurers' settled contract rights. Moreover, the 1987 statute deprives insurers of due process by impermissibly disturbing settled expectations and long-completed transactions.

The Michigan Supreme Court's express approval of the state's retroactive creation of new liabilities for insurers under completed insurance policy contracts has exacerbated the inherently uncertain process of fairly

pricing insurance. This is so because the benefit levels payable under Michigan's worker's compensation law form a key component of an insurer's costs not only for worker's compensation insurance, but for other state-mandated coverages like automobile liability and automobile no-fault, and because insurers are permitted to price their policies utilizing only their projected future costs, but not past or retroactively-imposed costs. The added measure of uncertainty created by the Michigan court's decision allowing the legislature *retroactively* to change these benefit levels at its whim will make it substantially more difficult, if not impossible, for insurers to make accurate decisions regarding the fair pricing of their product. As a result, Citizens, Michigan Mutual and other insurers writing worker's compensation and other required coverages in Michigan may cease providing this protection and find other sources for their surplus.

The Pricing Of Worker's Compensation Insurance In Michigan Is Prospective Only.

Because Michigan's economy has been so heavily industrialized for most of this century, worker's compensation has become, both economically and socially, the most important of all lines of insurance in the state. Ever since the first comprehensive worker's compensation act was adopted in the state in 1912, Michigan workers and their dependents have been entitled by statute to the immediate payment of a statutorily-guaranteed level of wage loss, survivors' loss and medical benefits for injuries and deaths arising out of and in the course of their employment. Moreover, claims that arise under the worker's disability compensation system in Michigan are

not subject to many of the common law defenses – like comparative or contributory negligence and assumption of the risk – which, until adoption of no-fault worker's compensation laws in the state, prevented many injured workers from receiving any benefits for wage loss, survivors' loss and medical expenses resulting from on-the-job injuries.

Employers that are subject to the Michigan Worker's Disability Compensation Act are required by law to secure for all of their employees the payment of these statutorily-granted benefits. Mich. Comp. Laws Ann. § 418.611 (West 1990). Some very large employers like the Petitioners herein secure their obligation to pay worker's compensation benefits to their employees by becoming authorized self-insurers. All other employers, however, must secure this obligation by purchasing policies of insurance from companies which agree, and are authorized by the state, to write this line of business in Michigan. *Ibid*. Because Michigan employers are required by law to purchase worker's compensation insurance (except for those few employers who are granted the privilege of self-insuring), insurers who write this business in the state are required to insure every employer seeking such coverage. They may do so either by contracting directly and voluntarily with the employer, or by providing coverage through the Michigan Worker's Compensation Placement Facility. The Facility is a statutorily-created assigned risk pool, an insurer of last resort in which each insurer authorized to write worker's compensation insurance in Michigan must participate as a condition of its authority to transact such insurance in the state. Mich. Comp. Laws Ann. § 500.2301 (West 1983).

Insurance is one of only a few products of which the seller's actual cost is unknown when the product is sold. When a worker's compensation insurer issues a policy to cover losses in a future period and charges a premium therefor, that insurer merely is estimating the dollar amount of its ultimate *future* obligation to pay (1) claims arising under the policy, (2) claims-related expenses, (3) overhead and (4) other underwriting expenses. Thus, with the exception of a small minority of policies which are retrospectively-rated,[4] insurance premiums are prospective only. An insurer does not – indeed, *cannot* – attempt to recover losses and expenses for a prior period through the premium it charges for a policy which has been issued to cover a future period. Once an insurer incurs a loss that is covered by the policy, or incurs a policy-related expense, if the premium charged for the policy is inadequate to cover the loss or expense, the insurer cannot recoup that loss through future premiums. Michigan Insurance Bureau Casualty Insurance Rate Rules 5(1), 6(1) & 7(1), Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1)(1980). It is, therefore, critical to the fair pricing of worker's compensation and other

[4] With a retrospectively-rated policy, the insurer and insured agree that the policy premium will be determined after the close of the policy period on the basis of actual loss data. Even then, however, once the policy premium is determined, it cannot later by re-determined because of a retroactive change in the insurer's costs. Retrospectively-rated policies comprised only 1.06% of all worker's compensation policies sold in Michigan in 1988, the latest full year for which such data are available from the Michigan Insurance Bureau.

insurance that insurers have a stable basis from which to estimate the costs of paying claims and expenses under the coverage provided.

The claims cost component of insurance pricing (that is, the insurer's cost to pay covered claims and claims-related expenses) is comprised of three factors: claim frequency (the number of claims occurring during a given policy period), claim severity (the type of injury suffered, e.g., a back injury or loss of the industrial use of a limb) and the level of benefits which the insurer must pay for a covered claim. Claim frequency and claim severity are, of course, impossible for either the insurer or the insured to know in advance of the time period covered by the insurance policy. Only long after the policy period has ended can the contracting parties know how many claims occurred and how severe those claims are.

As a result, insurers estimate future claim frequency and severity by examining historical claims data and attempting to project future costs from the historical information. Making this task more difficult is the fact that claim frequency and severity can vary from year to year, sometimes dramatically. The process of estimating frequency and severity for future periods is, at best, inexact.

With respect to state-mandated insurance coverages like worker's compensation, automobile liability and automobile no-fault, the third element of claim costs – the level of benefits which a claimant may recover – is (or at least it should be) relatively more stable than the first two elements because the benefit level is set by law. *Amici Curiae* do not contest the state's power *prospectively* to

change and therefore affect future benefit levels. Because insurance premiums are charged prospectively, a forward-looking change in benefit levels would not materially affect insurers' ability to price coverages fairly. Insurers and insureds still could estimate the third element of future insurance claim costs with a greater degree of accuracy and certainty than they could estimate the first two elements.

Where, however, the state may *retroactively* increase (or decrease) insurers' liability by effecting changes in benefit levels for policy periods long-since closed, the already uncertain process of projecting future costs is made even more uncertain. The sole element of claim cost that remained relatively stable – benefit levels – no longer would be available to Petitioners, or as a means of allowing insurers to price their product fairly to themselves and their insureds.

SUMMARY OF ARGUMENT

Just as surely as the Michigan legislature's 1987 amendment to § 354 of the worker's compensation law impairs Petitioners' contractual relationships with their employees, this amendment also directly and substantially impairs the express contracts of worker's compensation insurers and their insureds. Moreover, this severe contractual impairment is not necessary to correct a general social problem. To the contrary, the contractual impairment accomplished through the 1987 statute benefits only a discrete class of persons, and does so through means which are not necessary to achieve the legislature's stated objectives.

The 1987 amendment to § 354 violates the Due Process Clause because it completely lacks substantial fairness with respect to the settled expectations of worker's compensation insurers. Insurers were entitled to and did reasonably rely, in the ordering of their business affairs, on the satisfaction of their policy obligations to their insureds under existing law. The state should not be allowed to thwart that reasonable reliance by imposing in 1987 *five years* of retroactive liability for contractual obligations which already had been satisfied, merely because the legislature believes that workers injured before March 31, 1982 should receive as much in worker's compensation benefits as persons injured after that date. The impact of the Michigan Supreme Court's decision on insurers' reasonable expectations, and on the inherent uncertainty in the prospective pricing of worker's compensation and other lines of insurance, could drive insurers out of the Michigan insurance market. The resultant lack of insurance, and the higher premiums charged for what coverage would be available, would cause substantial hardships throughout the state and national economies.

ARGUMENT

I. THE CONTRACT CLAUSE BARS THE MICHIGAN LEGISLATURE FROM RETROACTIVELY IMPOSING ON INSURERS ADDITIONAL LIABILITIES TO THEIR INSUREDS LONG AFTER THE INSURERS FULLY HAD DISCHARGED THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING LAW.

There can be no doubt that the 1987 amendment to Michigan's worker's compensation statute impairs

express contract rights and obligations that are entitled to protection under the Contract Clause of the United States Constitution. The Michigan legislature, with the blessing of the state Supreme Court, effectively has *reopened* claims arising under executed worker's compensation insurance policy contracts, which claims were discharged pursuant to the unambiguous language of the policies themselves and existing law. The Michigan Supreme Court clearly misapplied this Court's Contract Clause decisions in finding that the 1987 amendment to § 354 is constitutional.

A. Express Contractual Rights Of Insurers Under Michigan Worker's Compensation Policies Are Protected By The Contract Clause.

Most, if not all, worker's compensation insurance policies issued in Michigan – including those issued by Citizens, Michigan Mutual and members of the MAIC, AAI and AIA who write worker's compensation insurance in the state – contain the following standard policy language:[5]

> WORKERS COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE POLICY
>
> In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.
>
> * * *

[5] A copy of Michigan Mutual's worker's compensation policy, containing the standard policy language, appears in the Appendix to this Brief.

> Part One – Workers Compensation Insurance
>
> * * *
>
> B. We Will Pay
>
> We will pay promptly when due the benefits required of you by the workers compensation law.

"Workers compensation law" is defined in the standard policy language as

> the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period.

Amici and other insurers who paid coordinated worker's compensation benefits in Michigan on behalf of their insureds from March 31, 1982 through May 14, 1987 have satisfied their obligations under this express policy language. The Insurers promptly paid worker's compensation benefits on behalf of their insureds as those payment came due. Moreover, those payments properly were coordinated under the state's worker's compensation law, as that law had been interpreted by the Michigan Supreme Court in *Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985). Thus, as the insurers made these payments, they fully satisfied their express contractual duty to "pay promptly when due the benefits required of [their insureds] by the workers compensation law," which law included "amendments which [were] in effect during the policy period."

It is beyond peradventure that the express promises contained in the insurance policy contracts under which worker's compensation insurers paid benefits from

March 31, 1982 through May 14, 1987 fall within the class of "contracts, executed or executory, whether between individuals or the state and others" which the Contract Clause of the United States Constitution protects from impairment by the state. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). As *Amici Curiae* discuss below, the 1987 amendment to § 354 impermissibly impairs those protected contractual rights.

B. The Impairment Of Insurers' Express Contracts With Their Insureds Violates The Contract Clause.

The Michigan Supreme Court's erroneous finding that § 354 is constitutional under the Contract Clause is the result of the court's misapplication of the three-part test which this Court recently has applied to legislation challenged under the Contract Clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). This Court, properly applying the *Energy Reserves Group* test, should reverse the state court's decision because the 1987 amendment substantially and impermissibly impairs express contractual obligations between worker's compensation insurers and their insureds.

1. The 1987 statute substantially impairs contract rights.

The "threshold inquiry" under the three-part *Energy Reserves Group* test (459 U.S. at 411) is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v.*

Spannaus, 438 U.S. 234, 244 (1978). The *Spannaus* Court held:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245.

Common sense and the plain language of the standard worker's compensation policy compel the conclusion that the 1987 amendment substantially impairs insurers' policy contracts with their insureds. An insurer which issued a policy with the standard language agreed to "pay promptly when due the benefits required . . . by the worker's compensation law," which law included "amendments . . . in effect during the policy period." Pursuant to that agreement, the insurer which paid the required benefits and coordinated them as required by § 354 during the March, 1982 through May, 1987 period fully satisfied its obligation under the policy. The 1987 amendment to § 354, however, essentially rewrote the completed policy contract by expanding the insurer's

liability far beyond that which had been agreed to by the insurer and insured.

Just as the Minnesota statue which this Court struck down in *Spannaus* "substantially altered" the petitioner's contractual relationship with its employees "by superimposing obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake" (438 U.S. at 240), the 1987 amendment to § 354 materially changed the nature of the relationship which existed when insurers entered contracts with their insureds and later discharged their obligations thereunder. Where insurers had satisfied their liabilities to their insureds between March 31, 1982 and May 14, 1987, Michigan's legislature retroactively changed those liabilities and thereby altered fundamentally the contractual duties that insurers had undertaken and met.

The Michigan Supreme Court believed that there is no substantial impairment in this case because the 1987 statute does not eliminate the "basic benefit" *to employers* of the worker's compensation scheme – immunity from tort suits. 436 Mich. at 534. Manifestly, this argument is not applicable to the express contractual relationship between a worker's compensation insurer and its insured. That relationship is governed solely by the terms of the policy contract itself and the worker's compensation law in effect when the policy's obligations are met. Clearly, the 1987 Michigan statute leaves nothing of the benefit for which the insurer contracted with its insured.

The worker's compensation insurer should be able to find comfort in the stability that results from having fully discharged, consistent with then-existing law, the policy

obligations for which it collected premiums from its insured. As a result of the 1987 statute and the Michigan Supreme Court's decision, however, the insurer now finds that the express provisions of its policy contract mean nothing because the state, years after the policy obligations lawfully were met, may retroactively change those provisions and impose *additional* liabilities under the executed contract. The 1987 amendment to § 354 has imposed a liability on worker's compensation insurers that was totally unexpected when the policy contracts were in effect, premiums were collected and claims were paid and discharged under prior law. More important, this additional obligation expressly never was agreed to by *either* the insurer or the insured. Both parties to the insurance contract had settled expectations of finality when payments were made thereunder. The Michigan legislature upset those expectations, thus working a severe impairment of the parties' contractual relationship.

2. The Michigan court misapplied this Court's holdings on the "legitimate purpose" and "reasonable means" requirements in Contract Clause cases.

The Michigan Supreme Court engaged in only minimal scrutiny of amended § 354. After deciding that "[t]here is a significant state interest in protecting the rights of disabled employees to receive the full compensation intended by the Legislature . . . " (436 Mich. at 535), the court found amended § 354 valid because the state "could have reasonably found that the coordination of benefits caused hardship among the employees whose

injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 536.[6] Although it conceded that the means chosen by the state to achieve its objectives involved the retroactive imposition of additional liabilities under completed transactions, the court found these means "reasonable" because "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Such a low level of scrutiny plainly is insufficient under this Court's decisions. Because the impairment of insurers' contracts which the amendment to § 354 creates is nothing short of "severe," the statute must be subjected to the "careful examination of [its] nature and purpose" which this Court required in *Spannaus*. 438 U.S. at 245. It is not enough that the 1987 statute is shown to satisfy the more deferential "rational relationship" standard that is applied to minimal intrusions into contractual relationships. Rather, amended § 354 cannot stand unless it is "necessary to meet an important general social problem." *Id.* at 247. The 1987 amendment does not even come close to satisfying this standard.

---

[6] The legislature did, however, create in 1980 a state-funded weekly compensation supplement for persons who were injured between September 1, 1965 and December 31, 1979. Mich. Comp. Laws Ann. § 418.352 (West 1990). This state-funded supplement entitles eligible employees to receive up to the same weekly compensation as persons injured after January 1, 1982. Mich. Comp. Laws Ann. § 418.352(6) (West 1990).

First, it is doubtful that the 1987 statute actually was intended to address "an important general social problem." Instead, the plain language of the amendment suggests that like the Minnesota statute challenged in *Spannaus*, the amendment to § 354 "has an extremely narrow focus" (*Id.* at 248), benefitting only that class of persons whose receipt of duplicative benefits prior to 1982 prompted the legislature to require coordination of benefits in the first place. "Thus, this law can hardly be characterized . . . as one enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248-249.

Second, even assuming that the legislature had a legitimate interest in preserving worker's compensation benefits for employees injured before 1982, it flatly cannot be said that the 1987 statute's retroactive imposition of liability on insurers – and the accompanying destruction of their completed contracts – was necessary to promote that interest. The 1987 amendment to § 354 did not benefit all employees injured prior to 1982. Instead, the statute expressly benefits persons with pre-1982 injuries *only* if they had access to duplicative benefits provided under the worker's compensation law and other retirement plans. If the Michigan legislature had wanted in 1987 to protect benefit levels for all employees injured prior to 1982, it rationally – and constitutionally – could have done so by making persons injured between January 1, 1980 and December 31, 1981 eligible for the weekly compensation supplement provided under § 352.[7] It would not, under those circumstances, have been necessary to impair insurers' contracts with their insureds.

---

[7] *See* note 6 *supra*.

Indeed, the Michigan Supreme Court's assertion that the 1987 statute is reasonable because it "imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute" (436 Mich. at 536) asks and answers the wrong question. Under this Court's Contract Clause cases, the proper inquiry is *not* what degree of retroactive liability is necessary to achieve the state's objectives, but instead whether *any* retroactive undoing of completed contracts is necessary. Here, the Michigan legislature rationally could have achieved its objectives by means other than upsetting already completed transactions. The 1987 statute cannot, therefore, pass constitutional muster.

II. THE 1987 LEGISLATION VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IMPERMISSIBLY DISTURBS THE SETTLED EXPECTATIONS OF THE PARTIES TO WORKER'S COMPENSATION INSURANCE CONTRACTS AND IS MANIFESTLY UNFAIR TO INSURERS.

Petitioners' Due Process Clause challenge to amended § 354 is equally applicable to *Amici's* unique interest in the protection of their vested contractual rights. Simply stated, the Michigan legislature's 1987 worker's compensation amendment unraveled completed transactions between worker's compensation insurers and their insureds and upset the settled expectations of the parties to the insurance policy contracts. This state action completely lacks substantive fairness and this Court should strike it down.

Just as surely as the Michigan Supreme Court allowed the state legislature retroactively to *increase* benefit levels for worker's compensation recipients who were injured before March 31, 1982, its decision would permit the state to impose retroactive *decreases* in benefit levels and require injured workers to reimburse employers and their insurers for "overpayments" made many years earlier. It is manifestly unfair, under either circumstance, to permit the state to upset insurers' expectations regarding the cost of insurance for periods long-since closed.

If the Michigan court's decision is allowed to stand, the resulting hardship on insurers, insureds and ultimately, Michigan workers could be enormous. This result flows directly from the inherently uncertain nature of insurance pricing. Most business entities can recover unexpected losses attributable to past periods by building the losses into the price of products which they sell in the future. An insurer, however, cannot recoup through the price of its insurance policy – which is issued to cover claims occurring during a future period – losses which arose in past policy periods. Petitioners, of course, suffer a similar impact on their ability to predict future costs.

If benefit levels for state-mandated coverages like worker's compensation can retroactively be changed – upward or downward – at the state's whim, there will be no stability in the pricing of worker's compensation insurance and thus no basis for insurers to estimate accurately the future cost of providing protection to their insureds. As a result of the Michigan court's decision herein, an insurer pricing a worker's compensation policy to be issued in 1991, based on benefit levels set by law for claims paid in 1991, will have no assurance that in the

year 2001 the state will not retroactively impose additional liabilities for claims paid under the 1991 policy.

If worker's compensation insurers cannot price their product with any reasonable degree of confidence that they can recover even their actual cost of providing the product – much less recover a reasonable return for providing the coverage – they may simply cease writing that insurance and look to other sources in which to invest their surplus. The potential adverse impact on the availability of this line of insurance in Michigan is both obvious and substantial.

Worker's compensation is not the only line of insurance which could be affected adversely by the unfairness of the Michigan legislature's 1987 act. For any insurance coverage in which benefit levels are established by the state – which, in Michigan, includes no-fault automobile insurance[8] – the state's power to effect a retroactive alteration of liabilities by changing benefit levels for past periods removes the one source of stability contributing to the fair pricing of the insurance product. Insurers who do not feel confident that they will be able to recover their future costs, regardless of the premium they charge, may cease writing these lines of business in the state, making such coverage less available for consumers, and then available only at significantly higher premiums.

Even if insurers do not actually cease writing state-mandated coverages as a result of the uncertainty caused by the indiscriminate retroactive use of the legislative

[8] Mich. Comp. Laws Ann. § 500.3101 – § 500.3179 (West 1990).

power, the increased prices insurers are likely to charge for their policies to cover this uncertainty would work a significant hardship on insureds.[9] The ripple effect of this uncertainty through Michigan's and the nation's economies could be quite substantial.

The manifest unfairness of the 1987 amendment becomes plainly apparent when the Court considers insurers' substantial and perfectly reasonable reliance on (1) the March 31, 1982 act which permitted coordination of worker's compensation benefits with other retirement benefits and (2) the Michigan Supreme Court's authoritative interpretation of that act in the *Chambers* case. Insurers paid worker's compensation claims *as required by the plain language of their policies and existing law.* They were entitled to believe that they fully had satisfied their obligations to their insureds, and to rely on this belief in conducting their subsequent business affairs. The state should not be permitted to upset insurers' reasonable reliance on existing law and their contracts through the retroactive imposition of new liabilities.

[9] Michigan law permits insurers to consider uncertainty in developing rates. Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1) (1980), which implement § 2403 of the Michigan Insurance Code, Mich. Comp. Laws Ann. § 500.2403 (West 1990).

CONCLUSION

For the foregoing reasons, this Court should find that § 354 of the Michigan Worker's Disability Compensation Act, as amended in 1987, is unconstitutional, and reverse the decision of the Michigan Supreme Court in this case.

Respectfully submitted,

DONALD S. YOUNG
Counsel of Record
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560

Attorney for Citizens Insurance Company of America, Michigan Mutual Insurance Company, Michigan Association of Insurance Companies, Alliance of American Insurers and American Insurance Association

Of Counsel
KATHLEEN MCCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

APPENDIX

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

Amerisure™
Insurance Company

DETROIT, MICHIGAN

(A stock insurance company)

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who Is Insured

You are insured if you are an employer named in item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy

period. It does not include the provisions of any law that provide nonoccupational disability benefits.

D. **State**

State means any state of the United States of America, and the District of Columbia.

E. **Locations**

This policy covers all of your workplaces listed in items 1 or 4 of the Information Page; and it covers all other workplaces in item 3.A. states unless you have other insurance or are self-insured for such workplaces.

PART ONE – WORKERS COMPENSATION INSURANCE

A. **How This Insurance Applies**

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. **We Will Pay**

We will pay promptly when due the benefits required of you by the workers compensation law.

C. **We Will Defend**

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;

2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;

3. litigation costs taxed against you;

4. interest on a judgment as required by law until we offer the amount due under this insurance; and

5. expenses we incur.

E. **Other Insurance**

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. **Payments You Must Make**

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. **Recovery From Others**

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. **Statutory Provisions**

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an

agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO – EMPLOYERS LIABILITY INSURANCE

A. **How This Insurance Applies**

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. **We Will Pay**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;

2. for care and loss of services; and

3. for consequential bodily injury to a spouse, child, parent, brother of sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. **Exclusions**

This insurance does not cover:

1. liability assured under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;

2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;

3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;

4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;

5. bodily injury intentionally caused or aggravated by you;

6. bodily injury occuring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;

7. damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

D. **We Will Defend**

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request; but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. **Other Insurance**

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. **Limits of Liability**

Our liability to pay for damages is limited. Our limits of liability are shown in item 3.B. of the Information Page. They apply as explained below.

1. Body Injury by Accident. The limit shown for "bodily injury by accident-each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident. A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease-policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. **Recovery From Others**

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. **Actions Against Us**

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and

2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.

PART THREE – OTHER STATES INSURANCE

A. **How This Insurance Applies**

1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
2. If you begin work in any one of those sates and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

B. **Notice**

Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

PART FOUR – YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this pc licy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE – PREMIUM

A. **Our Manuals**

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. **Classifications**

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. **Remuneration**

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and

2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. **Premium Payments**

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. **Final Premium**

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.

2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate

cancellation table and procedure. Final premium will not be less than the minimum premium.

F. **Records**

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. **Audit**

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX – CONDITIONS

A. **Inspection**

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. **Long Term Policy**

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. **Transfer of Your Rights and Duties**

Your rights or duties under this policy may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal rerpresentative as insured.

D. **Cancellation**

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancellation notice.
4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

E. **Sole Representative**

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancellation.

The policyholder shall participate, to the extent and upon the conditions fixed and determined by the board of directors of the Company in accordance with the provisions of law, in the distribution of any unabsorbed premiums, savings or dividends as may from time to time be so fixed and determined.

IN WITNESS WHEREOF, THE AMERISURE INSURANCE COMPANY has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the information page by a duly authorized representative of the company.

/s/ Roy A. Styles
Secretary

/s/ E. L. Cox
President

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

No. 90-1390

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Michigan

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Scott G. Campbell
(Counsel of Record)
Christopher C. Palermo
KELLEY DRYE & WARREN
101 Park Avenue
New York, New York 10178
(212) 808-7800

July 12, 1991

QUESTION PRESENTED

Amicus will address the following issue:

Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

STATEMENT 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE COURT'S RECENT "REASONABLENESS" APPROACH TO THE CONTRACT CLAUSE SHOULD BE ABANDONED 3

A. The Court's Current Balancing Approach Is Unprincipled And Unworkable 5

B. The Court's "Reasonableness" Test Flies In The Face Of The Text Of The Contract Clause And The Intent Of The Framers . . . 8

II. THE COURT SHOULD RESTORE ITS ORIGINAL INTERPRETATION OF THE CONTRACT CLAUSE AND PROTECT SETTLED CONTRACTUAL EXPECTATIONS 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) . . . . . *passim*

Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987) 4, 12

City of El Paso v. Simmons, 379 U.S. 497 (1965) 4

Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) 6

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 11

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 6, 9

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 3, 4, 6

National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) 8

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) 8, 11

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) 11

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 11

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) . . . . . *passim*

Statutes:

An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789) 10

Miscellaneous:

Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) 7
A. Cox, *The Role of the Supreme Court in American Government* (1976) 8
The Federalist No. 44 (C. Rossiter ed. 1961) 10
Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L.Q. 525 (1987) . . . . . *passim*
2 J. Madison, *The Records of the Federal Convention of 1787* (M. Farrand ed. 1911) . 10, 11
Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918 (1984) 12, 13
Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) 7, 11
L. Tribe, *American Constitutional Law* (2d ed. 1988) 5, 9
B. Wright, *The Contract Clause of the Constitution* (1938) 9, 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 90-1390

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more

than 120,000 members throughout the United States. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. WLF has long been interested in the promotion of the economic liberties recognized in the United States Constitution, as well as the protection of private contractual rights against improper governmental intrusion.

This brief will bring relevant authorities to the attention of the Court that may not be emphasized or brought to the attention of the Court by the parties or by other *amici curiae*. Among other things, it will explain why the Supreme Court's recent Contract Clause decisions are contrary to both the language and purpose of the Clause. WLF believes an alternative to these analyses is faithful to the language and intent of the Contract Clause and will protect pre-existing contractual expectations. WLF has no other interest in the resolution of this case, political or economic.

STATEMENT

In the interest of brevity, WLF adopts the Statement included in the petitioners' brief.

SUMMARY OF ARGUMENT

The Contract Clause of the United States Constitution flatly prohibits state laws impairing the obligations of contracts. In its recent decisions, this Court has strayed from that straightforward principle. The result has been a "reasonableness" test that fails to give lower courts an intelligible, consistent standard of review. Moreover, it invites policy debates and value judgments that are at odds with the very purpose of the Constitution. The

Court should discard this test and return to its constitutional guidepost.

Consistent with the language and history of the Contract Clause and the Court's own prior interpretations, this Court should read the Contract Clause as an absolute ban on state laws that redistribute resources from one contracting party to another in violation of pre-existing contractual obligations. Under a faithful reading of the Contract Clause, Michigan's workers' compensation statute is clearly unconstitutional since it redistributes resources in violation of settled contractual expectations.

The judgment of the Supreme Court of Michigan should be reversed.

ARGUMENT

I. THE COURT'S RECENT "REASONABLENESS" APPROACH TO THE CONTRACT CLAUSE SHOULD BE ABANDONED.

The Contract Clause of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. Despite this absolute and unconditional language, the Court's recent decisions have engrafted a qualifying reasonableness proviso that nowhere appears in the Clause *per se*. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-06 (1987).

Notwithstanding the Clause's unequivocal prohibition, the Court has suggested that a contractual impairment is permissible where state policy goals are more weighty. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-51 (1978) (Court struck down legislation

after assessing the severity of the impairment and the extent of the State's interest in enacting legislation, noting "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear").

The Court's most recent decision restates this "balancing test" formulation. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502-06. In *Keystone*, the statute in question "operates as 'a substantial impairment of a contractual relationship.'" *Id.* at 504 (citation omitted). Nonetheless, after giving complete deference to the state's policy determination, the Court found that "the impairment of petitioners' right . . . is amply justified by the public purposes served by the Subsidence Act." *Id.* at 506. This apparent willingness to permit impairments of contractual obligations upon a minimal showing of public purpose effectively reads the Contract Clause out of the Constitution. *See generally City of El Paso v. Simmons*, 379 U.S. 497, 517, 521-28 (1965) (Black, J., dissenting) (stating that the Court has "balanc[ed] away the plain guarantee of Art. I, § 10").[1]

Although the Court itself has acknowledged that the Contract Clause was at one time "perhaps the strongest single constitutional check on state legislation," *Allied Structural Steel Co.*, 438 U.S. at 241, only two decisions in the last 40 years have invalidated state laws under the Contract Clause. *Id.* at 234; *United States Trust Co. v. New Jersey*, 431 U.S. at 1. *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner and Easterbrook, JJ., concurring) ("[b]y exploiting the unfortunate ambiguities that surround the word

[1]Nonetheless, the severity of contractual impairment in this case is such that, even if the Court adheres to its "balancing test" formulation, the Michigan workers' compensation statute cannot withstand constitutional scrutiny.

'reasonable,' the Supreme Court has defanged the contract clause").

A. The Court's Current Balancing Approach Is Unprincipled And Unworkable.

Because this Court has strayed from the language of the Constitution, its holdings do not articulate a coherent approach to the Contract Clause. The resulting decisions have been unpredictable and provide no clear guidance to lower courts. Indeed, the standard itself fluctuates markedly from opinion to opinion. For example, in *United States Trust Co. v. New Jersey*, the Court held that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25. While "reasonableness" suggests a minimal standard of review, the word "necessary" implies something more, without clearly indicating what that might be.

Furthermore, the Court stated that in assessing state laws impairing private contracts, courts should "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23. This implies *de minimus* judicial review, akin to the "rational basis" test for social and economic legislation under the Due Process Clause of the 14th Amendment. Such a standard further eviscerates the Contract Clause.

In contrast to the lenient approach for private contracts set forth in *United States Trust Co. v. New Jersey*, the Court suggested stricter scrutiny only a year later. *See Allied Structural Steel Co.*, 438 U.S. at 247 ("[y]et there is no showing that this severe disruption of contractual expectations was necessary to meet an important general social problem"); *see also* L. Tribe, *American Constitutional Law* 621 (2d ed. 1988) (characterizing the

"exacting standard of review" applied in *Allied Structural Steel Co.* as "strict scrutiny").

More recently, the Court's "refus[al] to second-guess" the state's judgment involved in *Keystone Bituminous Coal Ass'n*, 480 U.S. at 506, despite the acknowledged existence of a "substantial impairment of a contractual relationship," *id.* at 504, suggests yet another shift. Even where an opinion refers to more specific criteria, *see, e.g., Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413 (1983) (parties contracting in heavily regulated industry); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444, 447 (1934) (emergency legislation and temporary nature of relief), the weight given to those criteria has changed repeatedly. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. at 22-23 n.19. The upshot is a fluctuating standard of review that is inconsistent with the Contract Clause's language and purpose.

This standard also vests subjective discretion in the judiciary and thereby undermines the legitimacy of judicial review. As Mr. Justice Brennan noted in his dissent in *Allied Structural Steel Co.*, "The necessary consequence of the extreme malleability of these rather vague criteria is to vest judges with broad subjective discretion to protect property interests that happen to appeal to them." 438 U.S. at 261 (footnote omitted).

Yet another flaw in the formulation is its invitation to *ad hoc* policy analysis. Thus, in *Allied Structural Steel Co.*, the majority thought the effect of the impairment was "severe" "in an area where the element of reliance was vital." *Id.* at 246 (Stewart, J.) (joined by Burger, C.J., Powell, Rehnquist & Stevens, JJ.). The dissent claimed that "the Act does not impose 'sudden and unanticipated' burdens," *id.* at 254, and "will impose only minor economic burdens on employers whose pension plans have been adequately funded." *Id.* at 253. (Brennan, J., dissenting) (joined by White & Marshall, JJ.). With regard to the public purpose, the dissenters wrote that the Act "was designed to remedy a serious social problem," *id.* at 252, while the majority stated, "Not only did the Act have an extremely narrow aim, but also its effective life was extremely short." *Id.* at 248 n.21.

Similarly, in *United States Trust Co. v. New Jersey*, the majority indicated that the statute was a "drastic impairment," 431 U.S. at 31 (Blackmun, J.) (joined by Burger, C.J., Rehnquist & Stevens, JJ.), although the dissenters believed the impairment caused only "the most minimal damage on the part of the Authority's bondholders." *Id.* at 41 (Brennan, J., dissenting) (joined by White & Marshall, JJ.). Referring to the purpose of the statute, the dissenters wrote that it responded to "serious and growing environmental, energy, and transportation problems," *id.* at 38, while the majority stated that the "changes [in these problems] . . . were of degree and not of kind." *Id.* at 32.

These policy debates and the current shifting formulation that fosters them undermine the very purpose of a written constitution. To remain the enduring document that the Constitution is, its provisions must have some fixed meaning that transcends the value judgments of the sitting Supreme Court Justices. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. at 16 ("[w]hether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution"). *See generally* Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852-56, 862-63 (1989); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 984-92, 1004

(1987); A. Cox, *The Role of The Supreme Court in American Government*, 108-09 (1976).

B. The Court's "Reasonableness" Test Flies In The Face Of The Text Of The Contract Clause And The Intent Of The Framers.

Neither the text nor the history surrounding the Contract Clause supports the Court's balancing of its guarantees against state power that itself enjoys no special constitutional protection. The language of the Clause makes clear that it was not intended to be conditioned upon "reasonable" exceptions. If the Framers had wanted a balancing approach, they could have limited the scope of the Contract Clause to prohibit only "unreasonable" impairments, just as they barred only "unreasonable searches and seizures" under the Fourth Amendment. Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L.Q. 525, 544 (1987). That they did not do so invalidates a narrower interpretation of the Contract Clause.[2]

Likewise, the context of the Contract Clause within Article I, Section 10 belies any suggestion that the Framers intended to permit states to impose "reasonable"

---

[2]In other contexts, this Court has found a "reasonableness" limitation in provisions that are otherwise absolute on their face. *See, e.g., National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978) (Section 1 of Sherman Act prohibits only unreasonable restraints of trade). No similar interpretation is necessary or warranted with respect to the Contract Clause since it already reflects the restrictions on its scope that were intended by the Framers. It only applies to State laws and not federal legislation. Moreover, it only prohibits retroactive impairments. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827). A state is entirely free to regulate contract law prospectively. These limitations obviate any need for the balancing test adopted by the Court.

impairments on the obligations of contracts.[3] The placement of the Contract Clause in Article I, Section 10, Clause 1 -- with numerous other absolute prohibitions on state power -- refutes the notion that it alone could be singled out and subjected to "reasonable" exceptions. The distinction between Article I, Section 10, Clause 1 and Article I, Section 10, Clauses 2 and 3 further supports this conclusion. Unlike Clause 1, Clauses 2 and 3 expressly permit states to take certain otherwise prohibited actions if they obtain the consent of Congress.

The limited discussion of the Contract Clause during the ratification process indicates that it was intended to bar retrospective majoritarian interference with parties' settled contractual expectations. Kmiec & McGinnis, *supra* p. 8, at 529-34; L. Tribe, *supra* p. 5, at 613 ("clause was included primarily to protect private contracts from improvident majoritarian impairment").

The Contract Clause was modeled after the Ordinance of the Northwest Territory. *See* B. Wright, *The Contract Clause of the Constitution* 6-8 (1938); Kmiec & McGinnis, *supra* p. 8, at 529-30. The Ordinance provided, in relevant part:

> [A]nd in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or

---

[3]While the Court summarily dismissed the importance of context in constitutional interpretation in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 426-27, no sound basis exists for interpreting the Contract Clause without so much as considering the many other provisions of Article I, § 10, with which the Contract Clause is grouped.

engagements, bona fide and without fraud previously formed.

An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789).

In *The Federalist*, Madison decried "the fluctuating policy which has directed the public councils" and recognized that legislative interference with settled contractual rights was "contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist No. 44*, at 282 (J. Madison) (C. Rossiter ed. 1961). Indeed, Madison described the Contract Clause, along with the prohibition of bills of attainder and *ex post facto* laws, as a "constitutional bulwark in favor of personal security and private rights." *Id.*

The Framers were no doubt also influenced by the imperative of the rule of law that legislation be general and prospective. The Contract Clause is one of many Constitutional provisions requiring prospectivity and generality, including the prohibitions on taking private property without just compensation and on bills of attainder and *ex post facto* laws.

It is clear that the Framers included the Contract Clause with full recognition of its absolute requirements. Those opposed to the Contract Clause objected precisely because they feared it would prevent the necessary exercise of state power in times of crisis. *See* 2 J. Madison, *The Records of the Federal Convention of 1987* 439-40 (M. Farrand ed. 1911); B. Wright, *supra* p. 9, at 13. Despite these protestations, the Contract Clause was included. In response to those who argued that the Contract Clause was too broad, it was made clear that the Clause prohibited "retrospective interferences only." 2 J.

Madison, *supra*, at 440. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) at 286 (opinion of Johnson, J.) (stating that the contract clause was intended to guard against "arbitrary and tyrannical legislation over existing rights"). James Madison himself acknowledged that "inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it." 2 J. Madison, *supra* p. 10, at 440.

This Court's prior interpretation of the Contract Clause recognized its broad and absolute language and the intent of the Framers. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 206 (1819) ("[t]he convention appears to have intended to establish a great principle, that contracts should be inviolable").

By contrast, the current "reasonableness" formulation is at odds with the Framers' clear awareness that certain laws violating contractual rights would seem "proper, & essential" and that the Clause would cause certain "inconveniences." 2 J. Madison, *supra* p. 10, at 440. *See* Scalia, *supra* p. 7, at 856 ("I think it highly probable that over the past two hundred years the Supreme Court, though not avowedly under the banner of 'non-originalist' interpretation, has in fact narrowed the contract clause of the Constitution well short of its original meaning") (footnotes omitted).

II. THE COURT SHOULD RESTORE ITS ORIGINAL INTERPRETATION OF THE CONTRACT CLAUSE AND PROTECT SETTLED CONTRACTUAL EXPECTATIONS.

The Court should restore its original interpretation of the Contract Clause as a ban on all state laws that redis-

tribute resources in violation of existing contractual rights.[4] Such an interpretation is faithful to the actual language of the Constitution and the original understanding of the Framers. In addition, it eliminates the need for a balancing of interests and results in a more principled and predictable Contract Clause jurisprudence.[5]

Some have opposed such an interpretation of the Contract Clause, fearing it might lead to the kind of wholesale judicial invalidation of social and economic legislation that occurred under the now-discredited doctrine of substantive due process. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. at 60-61 (Brennan, J., dissenting). Preliminarily, it should be noted that such a result-oriented argument is itself constitutionally unprincipled. Constitutional obligations cannot be ignored merely because they create a barrier to some legislation, however desirable that legislation may be considered as a matter of public policy. Furthermore, such concerns

---

[4]Kmiec & McGinnis, *supra* p. 8, at 525; *see* Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918 (1984).

[5]Petitioners have proposed an alternative formulation, requiring that "any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was 'essential to the achievement of an important state purpose.'" Petition For a Writ of Certiorari at 23 (*quoting United States Trust Co. v. New Jersey*, 431 U.S. at 32 (Burger, C.J., concurring)). Judge Posner has also suggested that an impairment may be permissible where there is a "strong need" or an "emergency." *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d at 743. While these approaches mitigate the drawbacks of the Court's current test, they continue to permit subjective value judgments and are still not in keeping with the absolute language of the Contract Clause. In any event, the mere observation that emergency situations and special needs may warrant impairment in exceptional cases in no way justifies this Court's application of a "broad, loose, and forgiving standard of reasonableness," *id.* at 744 (Posner and Easterbrook, JJ., concurring), to an unequivocal provision of the Constitution.

themselves ignore dispositive distinctions between the Contract Clause, grounded as it is in the text of the Constitution, and the amorphous doctrine of substantive due process. *See* Kmiec & McGinnis, *supra* p. 8, at 552-53. Indeed, the uncertainty generated by the Court's current *ad hoc* balancing approach creates far greater risk of unprincipled rejection of economic legislation than would an approach prohibiting retrospective laws.

Neither would an originalist interpretation of the Contract Clause "obliterate the police power of the States." *Allied Structural Steel Co.*, 438 U.S. at 241. Properly construed, the Contract Clause does not jeopardize the State's power to provide for the general welfare. It simply ensures that the State's power is exercised subject to proper constitutional restraints.

Because the Contract Clause is subject to several limitations, *see*, *supra* p. 8 n.2, it provides ample opportunity for the exercise of police power. For example, the Contract Clause does not prohibit a state's exercise of police powers that impose an incidental burden on one party to a contract, provided that the state does not redistribute resources from one contracting party to another in violation of preexisting contractual obligations. Additionally, the Contract Clause presents no bar to federal government activity.

Furthermore, if a state determines that immediate action is truly necessary, it can impair existing contracts if it provides compensation, so that the public at large bears the cost of the impairment. Kmiec & McGinnis, *supra* p. 8, at 554; Note, *supra* p. 12 n.4, at 928-29.

As applied to the facts of this case, the Michigan workers' compensation statute is clearly unconstitutional because it retroactively impairs the parties' contractual

obligations and imposes massive unforeseen financial liability on petitioners without providing compensation.

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Scott G. Campbell
(Counsel of Record)
Christopher C. Palermo
KELLEY DRYE & WARREN
101 Park Avenue
New York, New York 10178
(212) 808-7800

No. 90-1390

Supreme Court, U.S.
FILED
SEP 6 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION,
Petitioner,
v.
EVERT ROMEIN, *et al.*,
Respondents.

FORD MOTOR COMPANY,
Petitioner,
v.
ARTURO GONZALEZ, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD H. PILDES
933 Legal Research
Ann Arbor, MI 48109-1215
(313) 747-1014

DAVID SHAPIRO
1525 Massachusetts Ave.
Cambridge, MA 02138
Of Counsel

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Amici curiae will address the following question:

Whether the Due Process Clause of the United States Constitution prevents a State from permitting its legislature, in response to an unexpected state judicial decision, to enact retroactive amendatory legislation for the purposes of (1) restoring recently unsettled expectations; (2) promoting stability, certainty, and confidence in government's willingness to honor its prior commitments; and (3) requiring disgorgement of windfall gains.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THEORY, WELL-ESTABLISHED LEGISLATIVE PRACTICE, AND JUDICIAL PRECEDENT SUPPORT LEGISLATIVE POWER TO REJECT RETROACTIVELY JUDICIAL INTERPRETATIONS OF REGULATORY STATUTES	7
A. Congress	8
B. State Legislatures	13
II. PRINCIPLES OF FEDERALISM SUPPORT MICHIGAN'S AUTHORITY TO ACT RETROACTIVELY IN THE CIRCUMSTANCES OF THIS CASE	16
III. NONE OF THE CIRCUMSTANCES THAT MIGHT APPROPRIATELY LIMIT THE SCOPE OF RETROACTIVE LEGISLATION IS PRESENT HERE	22
A. Political Process Concerns	24
B. Extreme Delay	25
C. Unfair Surprise and Interferences with Free Choice	26
D. Destruction of Substantial Equity	29
E. State Self-Aggrandizement	30
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

149 Madison Ave. Corp. v. Asselta, 331 U.S. 795, *modifying* 331 U.S. 199 (1947) 10
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1943) 21
Addison v. Huron Stevedoring Corp., 204 F.2d 88 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953) 9
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 24
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 9
Asselta v. 149 Madison Ave. Corp., 79 F. Supp. 413 (S.D.N.Y. 1948) 10
Asselta v. 149 Madison Ave. Corp., 90 F. Supp. 442 (S.D.N.Y. 1950) 10
Baltimore & S. R.R. v. Nesbit, 51 U.S. (10 How.) 395 (1850) 18, 22
Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) ..... *passim*
Beauchamp v. Dow Chemical Co., 398 N.W.2d 882 (Mich. 1986) 25
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 7
Bradley v. Richmond School Bd., 416 U.S. 696 (1974) 28
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 12, 22
Canisius College v. United States, 799 F.2d 18 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987) 26
Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456 (1854) 22
Chambers v. General Motors Corp., 389 N.W.2d 685 (Mich. 1985) 2
Charlotte H. & N. R.R. v. Welles, 260 U.S. 8 (1922) 23
Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) 17
Coolidge v. Long, 282 U.S. 582 (1931) 27
Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988), *cert. denied*, 488 U.S. 955 (1989) 11
Dreyer v. Illinois, 187 U.S. 71 (1902) 18
El Paso v. Simmons, 379 U.S. 497 (1965) 23

TABLE OF AUTHORITIES—Continued

Page

Employment Div. v. Smith, 485 U.S. 660 (1988) 21
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 23, 29
Fleming v. Rhodes, 331 U.S. 100 (1947) 19, 21, 23
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 24
Forbes Pioneer Boat Line v. Board of Commrs., 258 U.S. 338 (1922) 14, 23, 30
Franks v. White Pine Copper Div., Copper Range Co., 375 N.W.2d 715 (Mich. 1985) ..... *passim*
Goddard v. Frazier, 156 F.2d 938 (10th Cir.), *cert. denied*, 329 U.S. 765 (1946) 17-18
Graham & Foster v. Goodcell, 282 U.S. 409 (1931) 12
Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 17
Haffner v. United States, 585 F. Supp. 354 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985) 12
Helvering v. Helmholz, 296 U.S. 93 (1935) 27
Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937) 17
Laubie v. Sonesta Int'l Hotel Corp., 752 F.2d 165 (5th Cir. 1985) 13
League v. Texas, 184 U.S. 156 (1902) 22
Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237 (D.C. Cir. 1960) 21
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) 30
Lichter v. United States, 334 U.S. 742 (1948) 23
Macomb County Prof. Deputies Ass'n v. Macomb County, 452 N.W.2d 902 (Mich. App. 1990) 16
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 20
McGautha v. California, 402 U.S. 183 (1971) 16
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 17
Missouri v. Dockery, 191 U.S. 165 (1903) 17
National R.R. Passenger Corp. v. Atchison, T., & S. F. R.R., 470 U.S. 451 (1985) 14
Nichols v. Coolidge, 274 U.S. 531 (1927) 27
Norman v. Baltimore & O. R.R., 294 U.S. 240 (1935) 30

TABLE OF AUTHORITIES—Continued

	Page
North Carolina v. Butler, 441 U.S. 369 (1979)	21
Orr v. Gilman, 183 U.S. 278 (1901)	22
Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940)	12, 26
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	29
Perry v. United States, 294 U.S. 330 (1935)	30
Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908)	19
Priest v. Canada Life Assur. Co., 446 N.W.2d 352 (Mich. App. 1989)	13, 16
Rochin v. California, 342 U.S. 165 (1952)	18
SEC v. Chenery Corp., 332 U.S. 194 (1947)	21
Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985)	13
Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829)	19
Schwarzkopf v. Sac County Bd. of Supervisors, 341 N.W.2d 1 (Iowa 1983)	13
Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948)	9, 10, 23
Smith v. Robinson, 468 U.S. 992 (1984)	11
Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1936)	12
Sweezy v. New Hampshire, 354 U.S. 234 (1957)	17
Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949)	10
Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936)	22-23
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	23, 30
United States v. Darusmont, 449 U.S. 292 (1980)	28
United States v. Heinszen & Co., 206 U.S. 370 (1907)	12, 15, 26
United States v. Sperry Corp., 110 S. Ct. 387 (1989)	11, 28
United States v. Wells Fargo Bank, 485 U.S. 351 (1988)	12
Untermyer v. Anderson, 276 U.S. 440 (1928)	27
Uphaus v. Wyman, 360 U.S. 72 (1959)	17

TABLE OF AUTHORITIES—Continued

	Page
Van Emmerik v. Janklow, 454 U.S. 1131 (1982)	13, 15, 26
W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)	24
Ward v. Illinois, 431 U.S. 767 (1977)	21
Watson v. Mercer, 33 U.S. (8 Peters) 88 (1834)	22
STATUTES	
Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 939	12
Fair Labor Standards Act, 52 Stat. 1060-1069 (1938) (as codified at 29 U.S.C. § 201 *et seq.* (1989))	9
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. 1415(e)(4) (Supp. IV 1986))	11
Mich. Comp. Laws § 418.351	3
Mich. Comp. Laws § 418.354	*passim*
Mich. Comp. Laws § 418.355	3
Mich. H.B. 5084 (enacted as 1987 Pub. Acts 28, § 354(17)-(20))	2, 3, 4
1980 Mich. Pub. Acts 357 § 1	3
Portal-to-Portal Act, 61 Stat. 84-90 (as codified at 29 U.S.C. § 251 *et seq.* (1989))	9
LEGISLATIVE MATERIALS	
Mich. History of Senate Bills in the House 5984 (1987)	3
10 Mich. House Journal 135-37 (Jan. 29, 1986)	2
2 Mich. House Journal 2058 (October 16, 1985)	2
Mich. Senate History of Senate Bills 3675 (1987)	3
MISCELLANEOUS	
Gov. Blanchard, News from the Office of the Governor (May 6, 1987)	2
Detroit Free Press, Jan. 5, 1986 at 3A	2, 8
Detroit Free Press, Nov. 3, 1985 at H1	8

TABLE OF AUTHORITIES—Continued

	Page
Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379	8, 16
Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991)	20
L. Fuller, *The Morality of Law* (2d ed. 1969)	7
Greenblatt, *Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540 (1956)	11, 24
H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tent. ed. 1958)	10-11
Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960)	7, 10, 23, 29
Jurisdictional Statement, *United States v. Crocker Nat'l Bank*, 481 U.S. 1047 (1987) (No. 86-1521)	12
Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425 (1982)	8, 15
Note, *A Process-Oriented Approach to the Contracts Clause*, 89 Yale L.J. 1623 (1980)	24
2 *Records of the Federal Convention of 1787* (M. Farrand ed. 1937)	21
Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 217 (1960)	8, 23, 27
3 J. Story, *Commentaries on the Constitution*, (1833)	19, 22
2 J. Story, *Commentaries on the Constitution* (5th ed. 1891)	22

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal public officials and governments throughout the United States. *Amici* have a strong interest in safeguarding the integrity of the internal governance decisions by which States structure their policy-making processes, particularly the process by which state legislatures respond to statutory decisions of state courts.[1]

STATEMENT

In 1985, the Michigan Supreme Court, interpreting 1981 amendments to the State's Workers' Disability Compensation Act, concluded that the legislature had reduced the benefits owing to workers injured *before* passage of those amendments. *Franks v. White Pine Copper Div.*, 375 N.W.2d 715 (1985) [decided together with *Chambers v. General Motors Corp.* and hereinafter cited as *Chambers*] (interpreting Mich. Comp. Law. § 418.354 (1991), "the 1981 Amendments"). This construction of the 1981 Amendments had a particularly devastating effect on elderly retirees whose workers' compensation benefits were their principal source of income.[2] Retirees who regularly had been receiving fixed weekly compensation benefits for many years suddenly found those benefits drastically reduced; in many cases, including those of

---

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] The *Chambers* decision marked the first instance in the state's history of such retroactive reductions in workers' compensation benefits to injured employees.

respondents Romein and Gonzalez, compensation benefits were eliminated altogether.

Prior to the 1985 *Chambers* decision, every administrative tribunal and lower court to consider the question had concluded that the 1981 Amendments had not been intended to have this draconian retroactive effect. Resp. Br. at 5. The *Chambers* court acknowledged that its interpretation was "inconsistent with the legislative objective" of the Workers' Compensation Act, but felt bound not "to substitute our view regarding the equities" for what it considered the plain meaning of the 1981 Amendments. 375 N.W.2d at 727. Later in 1985, Justice Boyle (the author of *Chambers*) dissented from the denial of rehearing, concluding that the court had erred and that the decision had had "harsh and unforeseen consequences." *Chambers v. General Motors Corp.*, 389 N.W.2d 685 (1985) (denying rehearing). In the case now before this Court, the Michigan Supreme Court, based on its knowledge of local conditions, recognized that its interpretation in *Chambers* had been "an unexpected circumstance." Pet. App. 17a.

Public and legislative response to this "unexpected circumstance" was immediate. The Governor who had sponsored and signed the 1981 Amendments, the current Governor, the State's Workers' Compensation Director, the Director of the Labor Department, and numerous legislative sponsors of the 1981 Amendments all characterized the *Chambers* decision as a misconstruction of the 1981 Amendments and deplored its unsettling consequences. J.A. 29-33; Resp. Br. at 5 n.6, 8 n.10, 10 & n.13.[3] Within days of the initial decision, legislation was introduced in the Michigan House specifically designed to overturn the *Chambers* result. H.B. 5084; *see also* 2 House Journal 2058 (October 16, 1985); Resp. Br. 8-9. Within one month of the denial of rehearing, on January 29, 1986, this bill passed the House by an 87-14 vote.[4]

[3] Detroit Free Press, Jan. 5, 1986 at 3A; Gov. Blanchard, News From the Office of the Governor 2 (May 6, 1987).

[4] 10 House Journal 135-37 (Jan. 29, 1986).

The bill was then referred to committee in the Senate, where it became enmeshed in efforts to revise other provisions of the Workers' Compensation Act. After the Senate Committee and then the full Senate endorsed a broader package of several significant amendments, and the package emerged from a House and Senate Conference, each Chamber approved a set of reforms that was signed into law on May 14, 1987 ("the 1987 Amendments").[5]

As originally approved in the House, H.B. 5084 was made partially retroactive to the effective date of the original 1981 Amendments. App. to Resp. Br. at 7a-8a. Workers injured after the 1981 Amendments were not to be affected. For workers injured before those Amendments, however, the legislature (like the Michigan Supreme Court) concluded that the outcome in *Chambers* had been unexpected, inconsistent with the policies of Michigan's Workers' Compensation Act, and inequitable. This perceived unfairness was heightened by the fact that, while some of the cost savings from the package of reforms had, at the same time, been passed on to workers in the form of much higher workers' compensation benefit levels, only workers injured *after* the 1981 Amendments were eligible for these increased benefits.[6] To protect what the legislature viewed as the morally significant, settled expectations of retired and elderly workers; to maintain the State's long-standing policy commitment not to reduce benefit payments retroactively; to preserve the integrity of the 1981 Amendments as a whole; and to rectify what the Michigan legislature perceived as an unjustified windfall gain for business from the unexpected *Chambers* decision, the legislature made its rejection of *Chambers* retroactive. As enacted in final form, the 1987

[5] *See* Senate History of Senate Bills 3675 (1987); History of Senate Bills in the House 5984 (1987). The Senate vote was 35-1; the House vote was 95-0. For citation to the full legislative history, *see* Resp. Br. at 8-9 & n.11.

[6] 1980 Mich. Pub. Acts 357 § 1; Mich. Comp. Laws § 418.351; Mich. Comp. Laws § 418.355.

Amendments thus precisely tracked the partial retroactivity provisions first adopted—in the immediate aftermath of *Chambers*—in H.B. 5084.

For other pertinent facts, *amici* adopt respondents' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief will address only the retroactivity challenges arising under the Due Process Clause. We agree with respondents that statutorily-mandated workers' compensation benefit levels are not the sort of "private agreements" to which the Contract Clause applies. *See* Resp. Br. Section I.[7] The Michigan statute presents a question of retroactive legislation—nothing more. More specifically, the central question this case poses is the legitimate extent of a State's power to give its legislature final say in the process of interpreting regulatory statutes.

1. Within a system of generally prospective laws, retroactive lawmaking power can, at times, be a necessary supplement. This Court and many others have endorsed the legitimacy of that supplemental power when Congress and state legislatures retroactively reverse the outcomes of judicial decisions interpreting regulatory statutes. In the circumstances presented here, courts have recognized that such legislative action can affirmatively promote the certainty, stability, and fairness central to the rule of law.

2. The choice of a state legislature to overturn a decision of its own courts raises special constitutional

[7] We also agree with respondents that, even if in some instances statutory benefits can somehow be viewed as incorporated into private agreements, the present case is not one in which the 1981 Amendments may be given such an effect. First, the courts of the concerned state, whose decisions on such questions have consistently been given deference by this Court, have concluded that no contractual interest was created by those amendments. In addition, the statutory provision that is challenged here only *restored* the benefit level to which respondents, who were injured prior to 1981, were entitled at the time the 1981 Amendments were enacted.

considerations that require federal courts to be wary of intervening. As a structural mater, States are free to allocate power between their courts and legislatures in whatever way they see fit. Not only are federal separation-of-powers principles inapplicable at the state level; the Constitution *affirmatively guarantees* to the States the right to structure their internal governmental arrangements free of federal control. Thus, if States choose to give their legislatures the last word on the meaning of public programs—even beyond what might be constitutionally permitted to Congress—the Federal Constitution does not constrain that choice. Indeed, the choice itself is constitutionally protected. Because the Michigan Supreme Court in this case, as in past decisions, found its legislature's actions consistent with the allocation of state lawmaking authority, this Court must respect that decision.

Similarly, that the unsettling event triggering a need for legislative action was a judicial decision, as opposed to some other change in circumstance, does not raise any distinct constitutional barriers. The *extent* to which a judicial decision departs from widely shared understandings and practices, or resolves genuine uncertainty, may be relevant in determining the firmness of the foundation for the legislature's action, or the substantiality of the countervailing equities. But even a judicial decision that may be fairly characterized as "foreordained," and obviously "correct," poses no ineluctable barrier to retroactive action.

3. Against this background, the Michigan legislation is fully consistent with established retroactivity doctrine. The ends for which the statute was enacted include (1) restoring recently unsettled expectation and reliance interests; (2) promoting stability, certainty, and confidence in government's willingness to honor its commitments; (3) "curing" a problem arising in the administration of an ongoing public program; (4) responding to a significant change in circumstance, specifically an unexpected

judicial decision; and (5) requiring the disgorgement of windfall gains. For retroactive and other legislation, these are clearly recognized legitimate public purposes.

In addition, the means chosen by the legislature—retroactive lawmaking—is both directly related to the legislature's objectives and constitutionally valid. In some circumstances, retroactive state legislation might be so harsh and arbitrary as to raise substantive due process questions. Thus, such circumstances might exist when retroactive legislation is used to target identifiable individuals or to single out especially vulnerable groups; when the adverse effects of retroactivity are intensified by extreme legislative delays; when interests resting on "substantial equity" are undermined; or when the retroactive legislation comes as a sharp surprise to settled and justifiable expectations—particularly if the disadvantaged party could have altered its conduct in advance to avoid the liabilities being retroactively imposed.

But none of these circumstances is suggested by this case. The businesses burdened here cannot be considered to be especially vulnerable to unfair legislative treatment or consideration. Moreover, the legislative response to the *Chambers* decision was swift in its initiation and not unduly delayed in its completion. Thus the legislature's action involved no surprise at all, let alone one that could be found unfair; the only genuine element of surprise in this case was that caused to employee expectations by the *Chambers* decision. For these reasons, petitioners also cannot claim interference with any interests resting on "substantial equity." And in any event, the obligations imposed by the State under its workers' compensation laws could not have been avoided by the petitioners even if those obligations had been entirely prospective in nature.

ARGUMENT

I. THEORY, WELL-ESTABLISHED LEGISLATIVE PRACTICE, AND JUDICIAL PRECEDENT SUPPORT LEGISLATIVE POWER TO REJECT RETROACTIVELY JUDICIAL INTERPRETATIONS OF REGULATORY STATUTES

Both Congress and the legislatures of the States have long found it necessary to legislate retroactively at times.[8] And as Justice Scalia has observed, "retroactive legislation . . . has long been upheld against constitutional attack where reasonable." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring).

The basis for retroactive policymaking in a context like that presented here has perhaps been most effectively stated by Professor Lon Fuller. As he noted, within a system of generally forward-looking laws, retroactive legislation may on occasion be necessary in order to preserve values central to the rule of law—ensuring stability, protecting legitimate expectations, and promoting certainty and reliability:

> A system of law composed exclusively of retroactive rules could exist only as a grotesque conceit worthy of Lewis Carroll or Franz Kafka. Yet a retroactive 'curative' statute can perform a useful function in dealing with mishaps that may occur within a system of rules that are generally prospective. . . . retrospective law-making can in some instances actually serve the cause of legality. . . . it can serve to heal infringements of the principle that like cases should receive like treatment. L. Fuller, *The Morality of Law* 74, 211 (2d ed. 1969).

---

[8] Retroactive legislation is here defined to embrace laws that "attach new rights and duties to already completed transactions." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960), *quoted in* Pet. Br. at 33-34.

In this case, the Michigan Supreme Court issued a decision in *Chambers* that, by its own acknowledgement, the Michigan legislature's judgment, and all available external evidence, was "unexpected." The effect of that decision—"harsh and unforseen" in the words of its judicial author—was the retroactive reduction of compensation benefits to previously injured workers. Those affected were the first in the State's history to find that their expectations of regular receipt of fixed benefits had been defeated. In restoring these benefits, and vindicating those expectations, the Michigan legislature sought to assure that the affected workers were treated no less equitably than others who had been injured in the past.

In the modern regulatory state, judicial decisions interpreting ongoing regulatory programs often have policy consequences far beyond their effects on the parties before the court.[9] On many such occasions, Congress and state legislatures have found it appropriate to reject those consequences and retroactively alter the outcomes judicial decisions have wrought. And in circumstances virtually identical to those here, courts consistently have upheld such actions.[10]

A. Congress

The famous "Portal-to-Portal" cases, which petitioners do not cite, are directly on point. *See, e.g., Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*,

[9] The *Chambers* decision appears to affect as many as 40,000 workers, may redistribute nearly $80 million from injured workers to businesses, and changes long-standing public policies regarding the stability of established compensation benefits. *See, e.g.*, Detroit Free Press, Jan. 5, 1986 at 3A; *id.*, Nov. 3, 1985 at H1.

[10] *See generally* Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 447 ("Curative laws, although commonly labeled retroactive because of their alteration of the pre-enactment status of an act, are nearly always sustained by the courts."); Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 468 (1982); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 217 (1960).

335 U.S. 887 (1948); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948). In 1938, Congress enacted the Fair Labor Standards Act ("FLSA"),[11] which required specific wage compensation rates for overtime work and provided liquidated damages as sanctions. Contrary to customary understandings in many industries, this Court, in a line of decisions culminating in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), held that the Act included employees' transportation, preparation, waiting time, and the like ("portal-to-portal time") within the statutory definition of "work." The decision subjected employers to potentially substantial liabilities, and one year later, Congress responded by enacting the Portal-to-Portal Act,[12] extinguishing—retroactively to the date of the original FLSA—any right of employees to recover under the *Anderson* ruling.[13]

This action was subjected to the same due process challenge advanced here. Employees argued that "the provisions of the [FLSA] statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services." *Seese*, 168 F.2d at 64-65. They also asserted that the decision in *Anderson* had generated "vested rights" in this Court's interpretation. But Judge Learned Hand expressed the universal judicial response: "I agree that that right was 'vested' in every sense of that word. However, it is another matter whether the uncertainty that had prevailed and the unexpectedness of the new liabilities were irrelevant upon whether the Act was constitutional." *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 97 (2d Cir.) (Hand, J., concurring), *cert. denied*, 346 U.S. 877 (1953). At least seven court

[11] 52 Stat. 1060-1069 (1938) (as codified at 29 U.S.C. § 201 et seq. (1989)).

[12] 61 Stat. 84-90 (as codified at 29 U.S.C. § 251 et seq. (1989)).

[13] As the Michigan legislature did here, Congress excepted individual cases that had been reduced to a final judgment before enactment of the Portal-to-Portal Act. *Seese*, 168 F.2d at 62.

of appeals decisions, 42 reported district court decisions, and 81 unreported ones held that the Constitution did not preclude Congress from retroactively overturning this Court's decision. After surveying these decisions, one court of appeals said: "[E]very decision has upheld the constitutionality of the statute. This unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain." *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713 (3d Cir. 1949).[14]

Two facets of the Portal-to-Portal controversy are particularly relevant here. First, Congress characterized this Court's decision in *Anderson* as "unexpected," *see Battaglia*, 169 F.2d at 259-60 n.11, and the courts accepted that characterization, *see, e.g., Seese*, 168 F.2d at 64. Second, Congress concluded that the Court's interpretation had generated an unjustified windfall gain for employees, *see Battaglia*, 169 F.2d at 259-60 n.11, and the courts also accepted that policy judgment. *Seese*, 168 F.2d at 64. The basic principle of these decisions is that "[a] retroactive statute, by remedying an unexpected judicial decision, may actually effectuate" important expectations. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960). In such circumstances, retroactive reversal is not constitutionally problematic.[15]

---

[14] This Court consistently denied certiorari. In *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 795, *modifying* 331 U.S. 199 (1947), after the Court initially affirmed a judgment for overtime pay, but before the time for rehearing had run, Congress enacted the Portal-to-Portal Act. On rehearing, this Court vacated and remanded for reconsideration under the new law, and on remand, the employers prevailed. *Asselta v. 149 Madison Ave. Corp.*, 79 F. Supp. 413 (S.D.N.Y. 1948) and later proceeding *Asselta v. 149 Madison Ave. Corp.*, 90 F. Supp. 442 (S.D.N.Y. 1950).

[15] As Professors Henry Hart and Albert Sacks rhetorically ask: "Would it be fair to say that, in principle, it was the *Mt. Clemens* line of decisions rather than the statute which was actually open to objection on the score of retroactivity?" H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 647 (Tent. ed. 1958). *See also* Greenblatt, *Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 556 (1956).

In *Battaglia*, General Motors successfully argued that the Constitution *does not* prevent Congress from going back nine years in retroactively depriving employees of the unexpected benefits of a recent Supreme Court decision. Today, General Motors urges that the Constitution *does* prevent a legislature from retroactively going back five years to deprive employers of *their* unexpected gains from a recent Michigan Supreme Court decision. If anything, the circumstances here more strongly support the legislature's actions; while the FLSA was the first federal statute regulating wages, the 1981 Workers' Compensation Amendments were enacted against a longstanding state practice of not reducing benefit levels retroactively.[16]

In *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), the United States Claims Court had held that the Department of the Treasury did not have statutory authority to impose a fee on awards issued by the Iran-United States Claims Tribunal; Congress swiftly granted that authority and made its statutory grant retroactive for three years, back to the date Treasury had first acted. This Court unanimously upheld the statute. Similarly, when a district court held certain commercial notes issued by local

---

[16] For another example of congressional action giving retroactive effect to its rejection of a decision of this Court, *see* the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. 1415(e)(4) (Supp. IV 1986)). In that Act, Congress specifically overturned this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), by permitting the award of attorney's fees in circumstances *Smith* had held precluded under earlier legislation. Congress made its policy choice retroactive to the day before *Smith* had been decided, more than two years earlier. *Counsel v. Dow*, 849 F.2d 731, 738-39 (2d Cir. 1988), *cert. denied*, 488 U.S. 955 (1989). Upholding this retroactive overturning, the Second Circuit noted: " 'Curative' legislation such as this, which is designed to cure what *Congress perceived* as a defect in prior law, is entitled to particular deference." *Id.* (emphasis added). At least two district courts have reached the same conclusion, *id.* at 739; no court appears to have reached a contrary result.

governments not subject to estate taxes, and Congress retroactively overturned that decision,[17] the Solicitor General defended the statute on the ground that it was "designed simply to avoid giving taxpayers a windfall benefit as a result of a judicial decision that postulated (we believe erroneously) a previously unrecognized estate tax exemption." Jurisdictional Statement at 12-13, *United States v. Crocker National Bank*, 481 U.S. 1047 (1987) (No. 86-1521).[18]

Earlier in the century, this Court established the principles on which these legislative actions rest. A judicial decision about the meaning of a statutory policy creates no general bar to a legislative decision reaching a contrary policy conclusion and applying that conclusion retroactively. *See, e.g., Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1936); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *United States v. Heinszen & Co.*, 206 U.S. 370 (1907). Although a statute overturning a final judgment that is *res judicata* between specific parties might present a more difficult question,[19] even such actions have been sustained, as in the classic decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (legislature set aside probate court decree and ordered new hearing). *See also Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940) (five years after final administrative judgment, and long after time for judicial review had passed, Congress ordered new compensation hearing).

---

[17] *Haffner v. United States*, 585 F. Supp. 354 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985), the result of which was overturned by Section 641(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 939.

[18] This Court found that the original statute had not exempted the notes, thus obviating any constitutional challenge to the subsequent statute. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).

[19] In the present case, such final judgments were specifically exempted from the reach of the Michigan statute.

B. State Legislatures

Like congressional legislation, retroactive state policymaking has at times been prompted by judicial decisions interpreting statutes. And like the federal courts, state courts typically have upheld such legislation.[20] State legislatures have a substantial interest in the occasional use of this technique in order to retain ultimate control over ongoing regulatory programs.

This Court has had less occasion to review state legislation responding to state court decisions. But in *Van Emmerik v. Janklow*, 454 U.S. 1131 (1982), the Court concluded that a state court's rejection of a challenge to such legislation did not present a substantial federal question. Significantly, the State's justifications for retroactivity in *Van Emmerik* were less weighty than in the present case, and the burdens imposed substantially greater.

In *Van Emmerik*, the South Dakota statute under attack responded not to the legitimate expectations of elderly retirees but to a judicial decision holding that the proper sales tax rate on utility services was three percent, rather than the four percent imposed by the general sales tax. Although no well-entrenched state policy indicated that the general sales tax rate and that for utility services should be the same, the South Dakota legislature retroactively fixed a four percent rate reaching back 11 years. This Court sustained the South Dakota Supreme Court's conclusion that the act did not violate any constitutional prohibitions.

The broad range of retroactive policymaking (and precedent sustaining it) indicates not only the degree of disruption that would be caused by increased constitutional

---

[20] *See, e.g., Laubie v. Sonesta Int'l Hotel Corp.*, 752 F.2d 165 (5th Cir. 1985); *Priest v. Canada Life Assur. Co.*, 446 N.W.2d 352 (Mich. App. 1989); *Sanelli v. Glenview State Bank*, 483 N.E.2d 226 (Ill. 1985) (and cases cited therein); *Schwarzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1 (Iowa 1983) (and cases cited therein).

constraints on retroactivity, but the extent to which the kind of retroactivity involved here is widely regarded as appropriate and fair. In part because of the frequency of such retroactive policymaking, petitioners bear a heavy burden of proving that the effect of this state statute is so arbitrary, unfair, and irrational that it violates their constitutional rights. *See National R.R. Passenger Corp. v. Atchison, T., & S. F. R.R.*, 470 U.S. 451, 472 (1985).

Petitioners acknowledge only parts of this overwhelming array of case law. Seeking to meet their burden of proof, they distinguish the small sample of cases they cite, arguing that there are two radically different *kinds* of legislative action overturning judicial decisions. Pet. Br. at 38-44. The first are cases said to implicate only "curative" reversal of judicial decisions; the second are said instead to entail a "reversal" of legislative policy. Not surprisingly, petitioners assert that all the adverse decisions they acknowledge fall in the first category, while the instant case—allegedly standing alone in the case law—falls into the second. Such a distinction is of doubtful value,[21] and whatever its utility may be in other contexts, it is of no avail here.

First, when a legislature overturns a judicial construction of a statute, the suggested distinction is largely without substance. Beyond recitation of these labels, petitioners offer no helpful analysis, capable of being judicially applied, to distinguish between legislative reversals that merely "cure" statutory problems and those that are "true reversals." In all these cases, legislatures respond to a judicial decision, typically regarded as erroneous, that is said to require remedial or curative legislation. Taking petitioners' suggested line seriously would require courts to second-guess legislative judgments about the necessity for legislative action.

---

[21] The only decision of this Court in which the distinction appears even arguably to have contributed to the invalidation of a state legislative act is *Forbes Pioneer Boat Line v. Board of Commrs.*, 258 U.S. 338 (1922), discussed *infra* Section III.C and note 28.

Second, nothing distinguishes this case from those cited—including the Portal-to-Portal decisions and *Van Emmerik*—in which legislatures overturned other judicial decisions; if those cases are explained as "curative," the "curative" category must be applied here as well. Indeed, commentators have recognized as "curative" any legislation that simply overturns a statutory interpretation. *See, e.g.*, Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 468 (1982) ("[C]urative acts are statutes that retroactively adjust existing legislation to conform to the putative intent of the legislature . . . [T]hey are routinely upheld.").

Third, in every case of this sort, those disadvantaged by retroactive legislation claim a "sudden reversal" of policy. In *Heinszen*, for example, businesses complained that Congress, in retroactively authorizing tariffs eight years into the past, had simply enacted a new tariff. This Court said such a claim "begs the question" and "mis-stat[es] the nature of the act of Congress"; the statute "on its very face" had been designed as a response to a specific judicial decision. 206 U.S. at 385-86. Looking to the legislature's asserted purposes and to the context, the Court found that the statute had simply restored expectations that the Court's own decisions had disrupted.

Finally, on the facts of this case, there is no sudden "reversal of policy"; despite their reconstruction of the facts, petitioners cannot carry their burden of rebutting the well-substantiated conclusions of the Michigan Supreme Court and legislature that it was the court's own decision in *Chambers* that was "unexpected."

The labels "curative" and "reversal of policy" are conclusory and distract from genuine analysis. They are vestiges of a pre-Realist era in which courts sought to categorize problems in formal terms, rather than directly examining the underlying interests involved. Serious efforts to apply them would intrude on the prerogatives of state legislatures to define the bases for their actions. Instead, the Court has generally looked, and should con-

tinue to look, to the justifications for retroactive state legislation, to the nature of the interests affected, and to the extent of the burden imposed. As the following sections show, based on these concrete concerns, the Michigan legislature's actions fall well within constitutional limits.

II. PRINCIPLES OF FEDERALISM SUPPORT MICHIGAN'S AUTHORITY TO ACT RETROACTIVELY IN THE CIRCUMSTANCES OF THIS CASE

Some critiques of retroactive legislation focus on concern for protecting the judiciary from undue legislative interference, or protecting earlier legislatures from subsequent ones.[22] But as Justice Brennan noted, "we have held the States not bound, as is the Federal Government, by the doctrine of separation of powers." *McGautha v. California*, 402 U.S. 183, 254 n.3 (1971) (Brennan, J., dissenting). As a result, even if retroactive federal legislation might be barred in some circumstance by separation of powers principles, similar state legislation should not, on this ground, be held to violate the Constitution.

Yet, in essence, the allocation of policymaking authority between the branches of state government is ultimately all that is involved in this case. In the courts below, petitioners aggressively challenged the Michigan legislature's actions on *state* separation of powers grounds. The Michigan Supreme Court rejected those arguments, and, as in previous Michigan cases,[23] upheld the power of the legislature to give retroactive effect to a law overturning a statutory interpretation by that State's courts. Under Michigan law, the legislature simply has the final word on the meaning of the statutes it enacts. Arguments about whether that legislature actually honored the intent of the original, enacting legislature, or whether the Michigan Supreme Court's decision was unexpected,

[22] *See, e.g.*, Eule, *supra note* 10.

[23] *Priest v. Canada Life Assur. Co.*, 446 N.W.2d 352 (Mich. App. 1989); *Macomb County Prof. Deputies Ass'n v. Macomb County*, 452 N.W. 2d 902 (Mich. App. 1990).

are therefore ultimately beside the point. Michigan has, in a sense, chosen to give its legislature the option of acting as a court of last resort on questions of statutory construction—at least when general policy consequences are at stake. As Justice Stevens has said, "it is not our business to disagree with the state tribunal's evaluation of the State's own lawmaking process." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 483-84 (1981) (Stevens, J., dissenting).[24] Basic principles of constitutional federalism protect the choice Michigan has made. *See generally Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2400 (1991).

"Rights under [the Fourteenth] amendment turn on the power of the State, no matter by what organ it acts." *Missouri v. Dockery*, 191 U.S. 165, 170-71 (1903) (Holmes, J.). Of course, the Michigan legislature originally could have made quite explicit its decision to apply the 1981 Amendments only to workers injured after those Amendments took effect. Similarly, the Michigan courts could have interpreted the Amendments as having only prospective effect and hence as applicable only to such workers. Had the Michigan legislature intervened to clarify the 1981 Amendments before any court had construed them, it is hard to see any constitutional barrier that would have stood in the way. Had the legislature instead stepped in after a lower state court had interpreted the statute, while that decision could still have been reversed in a higher state court, a "retroactive" legislative clarification would surely not raise any constitutional problems. *See, e.g., Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Goddard v. Frazier*, 156 F.2d 938 (10th

[24] *See also id.* at 461 n.6 (majority opinion) ("the States are free to allocate the lawmaking function to whatever branch of the state government they may choose"); *Uphaus v. Wyman*, 360 U.S. 72, 77 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 256-57 (1957) (Frankfurther, J., concurring in result); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) (Cardozo, J.) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Cir.), *cert. denied*, 329 U.S. 765 (1946). If the State's highest court had rejected prior judicial interpretations, its decision would have had precisely the same retroactive effect as the legislation at issue here, and yet no constitutional issues would be raised. Finally, as occurred here, the legislature could intervene after interpretation of the statute by the State's highest court. Viewed from the perspective of the federal Constitution, this last situation is no different from the others. Whether a state legislature chooses to act before any judicial decision, after a lower court decision, or after a highest court decision, is purely a question of legislative judgment and the internal allocation of state policymaking authority. At least in the absence of some extraordinary abuse of power that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), as far as the Constitution is concerned, that is the end of the matter.

"It might seem advantageous to some of the states that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British Parliament. . . . Should such an organization be adopted by a state, whatever might be thought of its wisdom, where beyond the body politic of the state would exist any power to impugn its legitimacy?" *Baltimore & S. R.R. v. Nesbit*, 51 U.S. (10 How.) 395, 400 (1850).[25] Division of authority between courts and legislatures at the state level

[25] The most frequently cited statement of this view is from *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902):

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."

vary greatly from those the Constitution requires of the national government. Some state courts issue advisory opinions; participate directly in making political appointments; issue final rules of practice not subject to legislative validation; have a more unconstrained policymaking role through relaxed standing requirements or the power to issue prospective decisions beyond whatever limits Article III might impose; or serve in administrative capacities not available to the federal courts. *See, e.g., Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908) ("[W]hen, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned"). Ever since *Calder v. Bull*, this Court has recognized that state legislatures may similarly play a more direct, quasi-judicial role vis-a-vis their state courts than is permitted to Congress under separation-of-powers principles. "There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions." *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829). *See generally*, 3 J. Story, *Commentaries on the Constitution*, § 1392, at 266-67 (1833) (same).

The limited nature of the quasi-judicial role implicated here must be stressed. Thus, this is not a case in which a state legislature is upsetting a final judgment that is *res judicata* on the rights and liabilities of specific parties.[26] Indeed, adjudicated controversies between specific litigants are explicitly exempted from the reach of the 1987 Amendments. The legislature's concern was rather with the thousands of other individuals, not parties to the case, who were affected by the state court's ruling, and with the broad policy consequences of that ruling for an ongoing regulatory program. If it is necessary to draw a sharp line between legislative and judicial functions (and for the States it assuredly is not), this legislature

[26] Even if it were, the statute might still be valid. *See Fleming v. Rhodes*, 331 U.S. 100 (1947) (upholding retroactive legislation overturning final judgments).

has thus left to the courts the quintessential judicial function of resolving individual disputes; the Michigan legislature has addressed only the consequences of such resolutions for disputes not yet adjudicated. This focus, especially in matters of this magnitude, would seem to go to the heart of the legislative role.

In general, legislatures are no more disabled from responding to changed circumstances triggered by judicial decisions than by other acts. Judicial decisions do not differ in kind from other events that might disrupt settled expectations, constitute unexpected changes in circumstances, or produce unbargained-for windfall gains. The *extent* to which a judicial decision departs from widely shared understandings and practices, or resolves genuine uncertainty, may be relevant in determining the firmness of the foundation for legislative action, or the substantiality of the countervailing equities. But the substantial body of precedent on this practice, *see* Section I, shows that in cases involving legislative reversal of judicial decisions, courts examine these specific considerations just as they do in any other circumstance prompting retroactive legislation.

As we explained above, in the many cases upholding legislative reversals of judicial decisions, this Court and others have consistently considered the extent to which the decisions in question disrupted settled expectations or produced windfall gains.[27] And on questions such as these —which go to how necessary legislation is perceived to be—courts historically have deferred to legislative judgments. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). That the state courts are best positioned to characterize the local circumstances and purposes leading to state legislation further structures

[27] *See* Section I. In such analogous contexts as the availability of a remedy in habeas corpus, or in damages, for constitutional violations, the Court has looked to the "newness," or unpredictability, of the decision relied upon by the person alleging a constitutional wrong. *See generally* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991).

and constrains this Court's review. *See, e.g., North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979); *Ward v. Illinois*, 431 U.S. 767, 772 (1977); *see also Employment Div. v. Smith* 485 U.S. 660, 676-77 (1988) (Brennan, J., dissenting). Inquiry into whether a judicial decision was in fact a change in circumstance justifying retroactive legislation thus poses no special constitutional problems.

In addition, even a judicial decision that can be characterized as "foreordained" and obviously "correct" does not present an ineluctable barrier to legislative reversal. The relevant question is not whether legislation is retroactive with respect to a judicial decision or some other event, but whether, in context, the burdens imposed are so harsh, and the legislature's reasons for acting so arbitrary, as to constitute a denial of due process. Reversal of a judicial decision, in and of itself, is not *per se* so offensive to basic notions of fairness that it is constitutionally barred. *See, e.g., Fleming* (upholding retroactive reversal of even final judgments).

Federal administrative agencies, which at times combine adjudicatory and policymaking roles, have the power to adopt retroactive policies. *See, e.g., Leedom v. International Bhd. of Elec. Workers*, 278 F.2d 237 (D.C. Cir. 1960). More significantly, federal agencies have the power to respond to judicial decisions interpreting their governing statutes with retroactive policy changes. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 620 (1943). To deny at least this much power to state legislatures, responding to the interpretation of state regulatory programs by state courts, would make federalism an empty guarantee.[28]

[28] That principles of federalism support Michigan's authority to act as it did is underscored by the Framers' specific rejection of a proposed prohibition of retroactive state legislation. A proposal by Edward Rutledge—to add a ban on "retrospective laws" to the other specific prohibitions on state action—was deleted from the Convention draft by the Committee on Style. *See* 2 *Records of the Federal Convention of 1787* 440, 597 (Farrand ed. 1937). And

III. NONE OF THE CIRCUMSTANCES THAT MIGHT APPROPRIATELY LIMIT THE SCOPE OF RETROACTIVE LEGISLATION IS PRESENT HERE

No dispute can exist as to the legitimacy of the *ends* for which the Michigan legislature acted. Those ends

---

consistently with this decision, this Court frequently held, during the first half of the Nineteenth Century, that the Constitution did not preclude retroactive state civil laws. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) at 397 (Patterson J.) ("I had an ardent desire to have extended the provision in the constitution to retrospective laws in general."); *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456 (1854); *Baltimore & S. R.R.*, 51 U.S. (10 How.) at 401 ("That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day."); *Watson v. Mercer*, 33 U.S. (8 Peters) 88, 110 (1834) ("it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the state from passing retrospective laws generally; but only ex post facto laws."). Moreover, Justice Story, in the sentence of his treatise immediately following the one quoted by petitioner, Pet. Br. at 38, said that notwithstanding objections to retroactive laws, such laws are nonetheless "left open to the States, according to their own constitutions of government." 2 J. Story, *Commentaries on the Constitution* 272 (5th ed. 1891). *See* also 3 J. Story, *Commentaries on the Constitution* 266 (1833) (same).

Nor is there anything in the text or history of the fourteenth amendment to suggest that its adoption operated to limit the existing powers of the States in this respect. As the Court stated in *League v. Texas*, 184 U.S. 156, 161 (1902), the Amendment "contains no prohibition of retroactive legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." *See also Orr v. Gilman*, 183 U.S. 278, 286 (1901) (reaffirming *Carpenter, supra*). Thus, in the Fifth Edition of Justice Story's *Commentaries*, published in 1891, the passage quoted above appears unchanged. 2 J. Story, *Commentaries on the Constitution* 272 (5th ed. 1891).

To be sure, at the height of the era in which economic interests were held to be protected by notions of substantive due process, there are several suggestions in the Court's opinions that the fourteenth amendment prohibits retroactive state laws defeating "vested rights." *E.g., Treigle v. Acme Homestead Ass'n*, 297 U.S.

include (1) restoring recently unsettled expectation and reliance interests; (2) promoting stability, certainty, and confidence in government's willingness to honor its commitments; (3) responding to significant, sudden changes in circumstances, including unexpected judicial decisions; (4) requiring disgorgement of windfall gains; and (5) assuring that injured workers and their dependents have sufficient means to avoid falling into poverty and the need for public assistance. The propriety of these purposes, whether in the context of retroactive legislation or elsewhere, is well-established.[29]

The principal question, then, is whether the particular *means* chosen—retroactive policymaking—is so arbitrary and oppressive in the context of this case as to suggest serious substantive due process concerns. In specific circumstances, retroactive legislation might conceivably raise

---

189 (1936). But the only decision during this era that appears to rest exclusively on this rationale—and certainly the most recent—is *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922) (holding unconstitutional a state statute seeking to validate retroactively a toll collected from a vessel for passage through a canal). *Forbes* is distinguishable from the present case on many factual grounds, but more notably for present purposes, the Court's four paragraph opinion relies on no American precedent and cites no constitutional text or history to support the result. Whether or not that result is equitable, it provides no support for finding a barrier to retroactive state legislation in the Constitution's text or original understandings. Moreover, in the same year that *Forbes* was decided, this Court declined to extend it "beyond its facts," *Charlotte H. & N. R.R. v. Welles*, 260 U.S. 8, 12 (1922), and it has never since invoked the decision to invalidate any other state statute on retroactivity grounds.

[29] For cases recognizing the legitimacy of these purposes, *see* Section I. On preventing receipt of windfall profits, or requiring their disgorgement, as legitimate public purposes, see *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 n.30 (1977); *El Paso v. Simmons*, 379 U.S. 497, 515 (1965); *Lichter v. United States*, 334 U.S. 742 (1948); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Battaglia*, 169 F.2d at 259-60 n.11; *Seese*, 168 F.2d at 65. *See generally* Hochman, *supra*, at 705; Slawson, *supra*, at 226.

such concerns. Against that possibility, the Court might reserve some outer limitations on the power of state legislatures to overturn decisions of their own courts. The possible limitations that case law and the history of retroactive legislation suggest, however, are not remotely implicated in this case.

A. Political Process Concerns

When legislating retroactively, a legislature may be able to identify with certainty the particular individuals who will be adversely affected. Thus, retroactive legislation can be (and has been) a vehicle to target specific individuals or to single out particularly vulnerable groups for legislatively-imposed disadvantages. *See* Greenblatt, *supra*, at 540; *cf. Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) (Contracts Clause stemmed from "apprehension [of] violent acts which might grow out of the feelings of the moment").

The type of retroactive statute involved here raises no such question of possible exploitation. It is not targeted at a few employers singled out from the rest, *compare Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and is as general in its effects as prospective legislation on the subject would be. Moreover, petitioners General Motors and Ford, and business more broadly, can hardly be considered particularly vulnerable groups unlikely to have their interests heard and fairly considered in the Michigan legislature. In general, they are not "politically weak or an easy target for the imposition of costs and hence chosen to bear those costs without fair attention to [their] interests." Note, *A Process-Oriented Approach to the Contracts Clause*, 89 Yale L.J. 1623, 1646-47 (1980). And in this specific case, the Michigan statute was not enacted with "studied indifference", *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) (Cardozo, J.), to their interests. Business interests participated actively in the legislative process and succeeded in having the legislation as initially proposed transformed into a package of comprehensive reforms of

the compensation system; indeed, among the provisions included in this package as enacted was one that business had long sought and that overruled another decision of the Michigan Supreme Court. *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986) (holding exclusive remedy provisions of workers' compensation system do not bar actions for intentional torts). The legislation was not enacted hastily, but with full deliberation and attention to business concerns.

B. Extreme Delay

Retroactive legislation that responds to a change in circumstances and seeks to restore the *status quo* might raise concern if not enacted reasonably promptly. But in this case, legislation to overturn *Chambers* was introduced within days of the decision, passed by the House within one month of the court's denial of rehearing, and signed into law a little more than one year later. This is well within the time periods courts have accepted for legislative responses to judicial decisions. Particularly given the need for full legislative deliberation, and the fact that the challenged provision became part of a comprehensive reform of workers' compensation in Michigan, this action was reasonably prompt.

Petitioners obscure the fact that the legislation was a response to a *particular* judicial decision. Rather than recognizing that the statute was designed to overturn the ruling in *Chambers*—a decision rendered only 17 months earlier—they describe the statute as reaching back five years, to the effective date of the original 1981 Amendments. Of course, not until *Chambers* was decided was the legislature faced with the changed circumstance that triggered the need to consider a possible response.

Furthermore, even on petitioners' more expansive measure, the statute does not reach back nearly as far as existing precedent permits. In the Portal-to-Portal cases, *see* Section I.A, Congress acted almost a year after this Court's decision, and on petitioners' measure, the legislation there "reached back" nine years (to the original

Fair Labor Standards Act). More recently, courts have sustained Congress' decision, in validating Treasury Department regulations, to make its action retroactive for four years. *See, e.g., Canisius College v. United States*, 799 F.2d 18 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). In *Heinszen*, this Court sustained Congress' decision to "reach back" and validate a tariff collected six years earlier. And in *Van Emmerik*, which this Court dismissed for want of a substantial federal question, the state legislature acted within one year of a state supreme court decision, but the response "reached back" 12 years.[30]

It is difficult to know what to make of petitioners' assertion that, apart from "curative" cases, "we are not aware of any decision of any other court affirming the authority of a legislature to reach back beyond the session of its immediate predecessor." Pet. Br., at 41. If, as we believe, the cases just listed *all* involve "curative" legislation, then this case does as well; nothing distinguishes the Portal-to-Portal cases, *Van Emmerik*, and other cases cited in Section I from the situation here. And even if, for reasons we do not perceive, this case involves something radically different from "curative" legislation, numerous other cases (which petitioners do cite for other points[31]) uphold similar legislation in circumstances where legislatures have reached back as far—and in many instances much further—than here. As this well-established body of law makes clear, the Michigan legislature acted with sufficient promptness in overturning the result in *Chambers*.

C. Unfair Surprise and Interferences with Free Choice

Retroactive legislation most offends the values associated with security and stability when its burdens fall as a sudden surprise. Moreover, questions of fairness are intensified if a person would likely have altered his con-

[30] In *Paramino, supra*, Congress acted after new information became available and opened up hearings that had been reduced to final awards more than five years earlier.

[31] Pet. Br. at 39-40.

duct had he known in advance of the duties or liabilities that retroactive legislation subsequently imposes.

The combination of these factors best explains those few cases in this century in which this Court has invalidated retroactive legislation. The gift/estate tax cases, for example,[32] imposed retroactive taxes that, had they been known in advance, might well have caused parties to structure their transactions differently or not to make the gifts in question at all. Some of these cases also involved either the *first* federal gift tax, whose effect on previously completed transactions could well come as a surprise,[33] or, another, wholly new *type* of tax imposed for the first time.[34] In the same vein, *Forbes* involved "the most obviously unjust" retroactive law, a law that sought to impose a fee for a ship's use four years earlier of a particular lock and canal. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 217, 220 (1960). Had notice of the fee existed in advance, the ship's owners might well have charted a different course.

Neither unfair surprise nor interference with free choice can be ascribed to the statute challenged here. At the time they first took their aggressive litigation posture, petitioners knew that their argument was controversial; that other employers refused to make it; that the legislature had adopted a resolution rejecting it; and that administrative tribunals and lower Michigan courts were rejecting it whenever raised. They knew that, should they prevail in *Chambers*, legislative response was a distinct possibility. Moreover, at no point did they have any reasonable basis for acting as if *Chambers* were the final word; as soon as it was decided, legislation to overturn it was introduced, made retroactive, and quickly adopted

[32] *Helvering v. Helmholz*, 296 U.S. 93 (1935); *Coolidge v. Long*, 282 U.S. 582 (1931); *Untermyer v. Anderson*, 276 U.S. 440 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927), cited in Pet. Br. at 43.

[33] *Untermyer*, 276 U.S. 440.

[34] *Nichols v. Coolidge*, 274 U.S. 531.

in one house of the Michigan legislature. That thorough legislative deliberation took slightly more than one year does not make the final outcome any more of a surprise. "Appellee is hardly in a position to claim surprise at the [amendments] to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment." *United States v. Darusmont*, 449 U.S. 292, 299 (1980).

Nor can petitioners plausibly claim that they would have altered their conduct had they known in advance that they would have to pay full benefits to workers injured before 1982. First, at the time those workers were injured, Michigan law *required* those payments. Second, as most employers recognized, from 1982 (when the 1981 Amendments went into effect) to the 1985 *Chambers* decision, that remained the State of Michigan law. As sophisticated business entities, petitioners surely knew there was a significant risk that their litigation position would be rejected and that they would owe full benefit payments; they doubtless took that risk into account in their planning. Third, as soon as *Chambers* was decided, the immediate legislative response told petitioners they could not assume *Chambers* would stand inviolable.

Most significantly, workers' compensation is a mandatory regulatory scheme, not one of unconstrained voluntary choice. Even *had* this legislation come as a complete surprise, it likely would not violate substantive due process principles. Because neither employers nor employees can choose to opt out of the workers' compensation system, petitioners could not have chosen a different course (short of ceasing to do business in Michigan) had the statutory changes been enacted earlier and made prospective. That petitioners might have left Michigan altogether, or restructured any significant business decisions, is simply implausible, given the relationship of the amount in dispute to their revenues and earnings. *Cf. Sperry*, 110 S. Ct. at 395-96; *Bradley v. Richmond School Bd.*, 416 U.S. 696, 721 (1974). Indeed, although petitioners vaguely invoke "reliance," the record does not identify

any specific decision that might have been altered at any time had petitioners known—as they did in fact throughout—that they might well have to pay full benefits to workers injured before 1982. The Michigan legislature's action involved no surprise at all, let alone one that could be considered unfair. Nor did it unfairly impose liabilities that could have been avoided had they been clearly defined sooner.

D. Destruction of Substantial Equity

Interference with interests resting on reasonable reliance may be necessary but is not sufficient to invalidate retroactive legislation. Not every reliance-based interest receives or warrants the same constitutional protection. Instead, the *nature* and quality of the interest burdened is relevant to the permissible scope of legislative action; when a statute affects interests in which individuals have a substantial stake, legislative interference becomes more vulnerable to challenge under the Due Process Clause. *Cf. Energy Reserves*, 459 U.S. at 412; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (special protection for "investment-backed" expectations under Just Compensation Clause). As a leading study puts it, "it is not unconstitutional to deprive a person of a right which rests on no substantial equity." Hochman, *supra*, at 722.

In this case, the only interests resting on substantial equity are those of the injured workers affected, including elderly retirees. Their lives had been structured around the well-justified expectation that, like all previously injured workers, they would regularly receive the benefit payments (often their principal income source) to which they had been found entitled at the time an award had been made. Employers cannot point to any similar substantial equity, or indeed any investment at all, that could reasonably have been based on Michigan law as it stood prior to the legislation at issue. With regard to the pre-*Chambers* period, they cannot reasonably have invested in reliance on a statute whose meaning was at best controversial and *sub judice*. And virtually as soon as

Chambers was decided, legislation to reverse it retroactively was introduced and approved in one legislative chamber.

E. State Self-Aggrandizement

Retroactive state action might be subject to special judicial scrutiny when the State itself directly benefits from its own retroactive policies. In such cases, States confront special incentives that might raise concerns as to whether full and fair attention will be given to the interests disadvantaged by retroactive policies. *Cf. United States Trust v. New Jersey*, 431 U.S. 1 (1976) (heightened scrutiny under Contracts Clause).[35] In the gift/estate tax cases, and in *Forbes*, where the Court invalidated retroactive statutes, the State stood to benefit in just this way. But that is not the case here. The Michigan legislature has simply reached one more accommodation in the ongoing conflict between two powerful interests—business and labor.

* * * *

In sum, judicial decisions interpreting regulatory statutes are a subset of the larger class of events that occasionally may produce unexpected, unsettling disturbances to a long established *status quo*. At least apart from actual final judgments, judicial interpretations of statutes pose no special barrier to a legislative determination to adopt a retroactive policy response. Such responses may be circumscribed by the Constitution in the presence of at least one of the special factors noted above. But because none is present here, the Michigan legislation falls well within acceptable constitutional boundaries.

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

---

[35] The famous *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), and the Gold Clause cases, *Perry v. United States*, 294 U.S. 330 (1935) and *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), stand for the similar principle that repudiation of public (as opposed to private) obligations warrants heightened scrutiny.

Respectfully submitted,

RICHARD H. PILDES
933 Legal Research
Ann Arbor, MI 48109-1215
(313) 747-1014

DAVID SHAPIRO
1525 Massachusetts Ave.
Cambridge, MA 02138
Of Counsel

September 1991

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the Amici Curiae*